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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,

Respondents.

KEN F. MANS, individually and on behalf of all persons employed by Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,

Petitioners,

v.

SUNRAY D-X OIL COMPANY and SUN OIL COMPANY,

Respondents.

DEL JEANNENE JOBE individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in *Reibert et al.* v. *Atlantic Richfield et al.*, (judgment entered January 8, 1973), *Mans et al.* v. *Sunray D-X Oil Company*, (judgment

entered January 17, 1973), and *Jobe et al.* v. *Amerada Petroleum Corporation et al.*, (judgment entered February 6, 1973). Review of each decision is sought pursuant to Supreme Court Rule 23-5 for the reason that each case contains identical or substantially similar questions of law.

OPINIONS BELOW

Reibert et al. v. *Atlantic Richfield et al.*

The Court of Appeals' opinion in *Reibert et al.* v. *Atlantic Richfield et al.*, (Appendix A), is not reported. No opinion was written by the District Court. The Findings and Recommendations of the Magistrate, filed on March 20, 1972 (Appendix B) is not reported. The order and judgment of the District Court, entered on March 30, 1972 (Appendix C) is not reported.

Mans et al. v. *Sunray D-X Oil Company et al.*

The Court of Appeals issued a *per curiam* opinion (Appendix D) which will not be published. The opinion was based upon *Reibert et al.* v. *Atlantic Richfield et al.*, (Appendix A). The order of the District Court (Appendix E) issued on May 20, 1971 was not published. Judgment was entered on June 7, 1971 (Appendix F).

Jobe et al. v. *Amerada et al.*

The Court of Appeals issued a *per curiam* opinion (Appendix G) on February 6, 1973 which will not be published and was based upon *Reibert et al.* v. *Atlantic Richfield et al.* (Appendix A). No opinion was written by the District Court. The Findings and Recommendations of the Magistrate, filed on January 11, 1972 (Appendix H) is not reported. The Order and Judgment of the Court (Appendix I) entered March 20, 1972 was not published.

JURISDICTION

The Court of Appeals entered judgment in *Reibert et al.* v. *Atlantic Richfield et al.*, on January 8, 1973; *Mans et al.* v. *Sunray D-X Oil Corporation et al.*, on January 17, 1972 and *Jobe et al.* v. *Amerada Petroleum Corporation et al.*, on February 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. ARE THE ANTI-TRUST LAWS AS IMPORTANT TO "MEMBERS OF ANY OTHER CLASS OF WORKERS" AS THEY ARE TO BASEBALL PLAYERS, FOOTBALL PLAYERS, LAWYERS AND DOCTORS? *Flood* v. *Kuhn*, 407 U.S. 258, 292 (1972).

2. CAN LARGE NATIONALLY INTEGRATED OIL COMPANIES MERGE THEIR FACILITIES IN VIOLATION OF THE ANTI-TRUST LAWS AND UNILATERALLY TERMINATE WITH IMPUNITY, THOUSANDS OF AMERICAN WORKERS WHO WERE DECLARED SURPLUS TO THE NEEDS OF THE ORGANIZATION AS A RESULT OF THE MERGER?

3. CAN CORPORATIONS WITH ECONOMIC POWER GAINED THROUGH ANTI-TRUST VIOLATIONS BE PERMITTED TO DO THAT WHICH THE GOVERNMENT ITSELF CANNOT DO—DESTROY THE RIGHT OF EMPLOYMENT OF THOUSANDS OF WORKERS?

4. CAN SOCIETY, UNDER THE INSTITUTIONALIZED "WORK ETHIC", IMPOSE UPON MAN A MORAL AND LEGAL OBLIGATION TO WORK UNDER A COM-

PETITIVE DIRECTIVE, AND THEN DENY HIM ACCESS TO THE COURTS TO PROTECT THE OPEN MARKET AND FREE COMPETITION WHICH MUST BE RELIED UPON TO PRODUCE JOBS?

5. IN A COMPREHENSIVE STUDY OF THE "CONCENTRATION OF ECONOMIC POWER" CONDUCTED BY THE TEMPORARY NATIONAL ECONOMIC COMMITTEE AND ADOPTED BY CONGRESS, IT WAS STATED: "IT IS THE FUNDAMENTAL DUTY OF EVERY SOCIETY WHICH IS DEVOTED TO THE PRINCIPLES OF OUR POPULAR GOVERNMENT TO LEAVE NOTHING UNDONE TO PRESERVE AND GUARANTEE THE OPPORTUNITY TO WORK TO EVERY CAPABLE AND WILLING MAN."

a. Does this mean that Congress, by enacting the federal antitrust laws, was accepting its correlative obligation under the work ethic which provides that a state, with the right to insist that every one work, has the corresponding duty to assure to all its citizens the right to work?

b. Does this mean that Congress was relying upon the forces of free competition to produce and to protect job opportunities?

6. IF, AS WAS HELD IN *UNITED STATES* v. *ALUMINUM COMPANY OF AMERICA*, 148 F.2d 416, 428-429 (2d Cir. 1945), THE PURPOSE OF THE ANTITRUST LAWS "WAS A DESIRE TO PUT AN END TO GREAT AGGREGATIONS OF CAPITAL BECAUSE OF THE HELPLESSNESS OF THE INDIVIDUAL BEFORE THEM", AND "TO PERPETUATE AND PRESERVE, FOR ITS OWN SAKE AND IN SPITE OF POSSIBLE COST, AN ORGANIZATION OF INDUSTRY IN SMALL UNITS," MUST THIS NOT MEAN THAT CONGRESS

WAS SEEKING TO PROTECT AND EXPAND JOB OPPORTUNITIES THROUGH THE FORCES OF FREE COMPETITION?

7. DO EMPLOYEES FALL WITHIN THE AREA OF THE ECONOMY OR ZONE OF INTEREST SOUGHT TO BE PROTECTED BY THE ANTITRUST LAWS?

8. DO SELLERS OF LABOR IN A FREE AND UNRESTRAINED MARKET HAVE RIGHTS EQUAL TO BUYERS OF LABOR?

9. IF FREE COMPETITION IS THE FORCE RELIED UPON BY CONGRESS TO PRODUCE AND PROTECT JOBS, DO EMPLOYEES, INJURED OR THREATENED WITH INJURY AS THE RESULT OF AN ILLEGAL CORPORATE MERGER, HAVE STANDING TO FILE AN ANTITRUST SUIT UNDER SECTION 4 AND SECTION 16 OF THE CLAYTON ACT?

STATUTES INVOLVED

The applicable statutory provisions involved are in pertinent part set forth in Appendix J. Included are the following:

1. Sherman Act, Section 1, 15 U.S.C. sec. 1
2. Clayton Act, Section 4, 15 U.S.C. sec. 15
3. Clayton Act, Section 7, 15 U.S.C. sec. 18
4. Clayton Act, Section 16, 15 U.S.C. sec. 26
5. Interstate Commerce Act,
   a. Sec. 5, 49 U.S.C. sec. 5 (2) (a)
   b. Sec. 5 (2) (c), 49 U.S.C. sec. 5 (2) (c)
   c. Sec. 5 (2) (f), 49 U.S.C. sec. 5 (2) (f)
   d. Sec. 5 (b) (9), 49 U.S.C. sec. 5 (b) (9)
6. 10 Okla. Statutes 1971 sec. 12
7. 32 Okla. Statutes 1971 sec. 3

STATEMENT OF THE CASES

Introduction

The petitioners are asking this Court to review three separate corporate mergers which form a significant part in a general merger trend within the petroleum industry. These three mergers involved six previously independent oil companies with combined assets of nearly seven billion dollars. Considered with the numerous other corporate mergers involving oil companies, the petroleum industry has become highly concentrated. Fifteen of the largest oil companies, in 1968, controlled 75% of the total United States refinery capacity, and produced 61.8% of the domestic crude oil.

As a result of the merger trend and the increased economic concentration, thousands of petroleum related jobs have been eliminated. In the three cases involved in this petition, employees *terminated as a direct result of these mergers* filed private antitrust actions challenging the legality of the mergers.

THE ATLANTIC RICHFIELD-SINCLAIR MERGER

1. Facts of Case

This private antitrust suit was filed as a class action on September 15, 1969 in the United States District Court for the Northern District of Oklahoma to challenge, under the antitrust laws, the legality of the corporate merger of Atlantic Richfield Company and the Sinclair Oil Corporation. Reibert, a highly skilled research technician in the petroleum industry, had been employed by Sinclair for more than 17 years until Sinclair was merged into Atlantic Richfield.

Atlantic Richfield and Sinclair, two highly integrated oil companies operating in a national market, entered into a merger agreement on October 31, 1968. The merger was finally consummated on March 4, 1969. Immediately thereafter, there was a consolidation of facilities of Atlantic and Sinclair which resulted in the termination of employees. The named petitioner, Delbert C. Reibert, a salaried research technician, was terminated on June 13, 1969 when, as part of the merger and consolidation plans, the Sinclair research facilities located in Tulsa, Oklahoma were closed.

Just a few years before this merger, Sinclair had held 50% of the stock of the Richfield Oil Corporation. After Atlantic Refining acquired Richfield, Sinclair owned and held 2,447,162 shares of Atlantic Richfield; however, Sinclair was forced to sell these shares as a result of an antitrust agreement with the Justice Department. Thereafter, Atlantic Richfield turned around and acquired all of the stock of Sinclair. The Atlantic-Sinclair merger created a company with assets in excess of four billion dollars, controlling 7.6% of the national refinery capacity and 43% of the total refinery capacity in the State of Pennsylvania.

As part of the merger and consolidation plans, Atlantic Richfield unilaterally adopted a policy governing terminations resulting from the merger. It was explicitly stated by Atlantic Richfield that:

> "The purpose of this policy is to provide special allowances to certain employees **who will be terminated as a direct result of the merger** of Sinclair Oil Corporation into Atlantic Richfield Company." (Emphasis ours.)

Within the first year following the merger, 4,000 employees were, in the words of Atlantic, "declared surplus to

the needs of the organization as a result of the merger", and were terminated by Atlantic. Of this total number of terminations during the first year, there were 549 persons who had worked for Sinclair for a period longer than fifteen (15) years; and there were 561 persons who had worked for Atlantic for a period longer than fifteen (15) years. With its termination policy adopted as part of the merger plans, the average age of employees retained by Atlantic Richfield was nearly three years lower than it was for the respective companies prior to the merger—from an average of forty-five (45) years of age to an average of 42.13 years of age.

The employees, terminated by Atlantic Richfield as a direct result of the merger, lost their accumulated retirement credits. Persons over a certain age and possessing skills suitable only for the petroleum industry faced reemployment difficulty or they were unemployable. The named petitioner, Delbert C. Reibert, was nearly forty (40) years of age at the time of his termination. He had been with Sinclair for seventeen (17) years, during which time he had become highly skilled. His skill pertained to the petroleum industry and was not easily transferable. Following his termination, Reibert diligently sought, but was unable to find a position that could utilize his highly technical experience gained at the Sinclair Research Lab. In October, 1970, Reibert finally took a job as a draftsman, a position that he had held when he was first employed by Sinclair some eighteen (18) years earlier.

2. The Trial Court

After being terminated as a direct result of the Atlantic-Sinclair merger, the petitioner, Reibert, filed this suit as a class action on September 15, 1969. Petitioner sought treble damages under Section 4 of the Clayton Act (15 U.S.C. sec. 15), and injunctive relief under

Section 16 of the Clayton Act (15 U.S.C. sec. 26) for himself and on behalf of all other Atlantic-Sinclair employees similarly situated. On December 1, 1969, Petitioner filed a motion for partial summary judgment seeking to dispose of certain legal issues including standing of employees to sue under the antitrust laws. This motion was denied on February 24, 1970. From that date until March 20, 1972 when this case was dismissed on the motion for summary judgment filed by Atlantic Richfield, the petitioner engaged in extensive discovery, principally on the question of the legality of the merger. The trial judge adopted the Finding and Recommendations of the Magistrate without comment and dismissed the suit on the ground that employees lack standing under the antitrust laws.

3. The Appeal

On January 8, 1973, the Court of Appeals for the Tenth Circuit affirmed. It concluded that employment was not "business or property" as these terms are used in Section 4 of the Clayton Act (15 U.S.C. sec. 15). It further held that any injury suffered by the employees *was indirect or remote,* although the Court did agree that the employees *were terminated as a result of the merger.*

THE SUNRAY DX-SUN OIL MERGER

1. The Facts

This class action was filed on April 30, 1970 in the United States District Court for the Northern District of Oklahoma by the Petitioner, Ken F. Mans, for himself and on behalf of other employees similarly situated. It challenges the legality of the merger of Sunray DX Oil Company and Sun Oil Company under the antitrust laws and

seeks treble damages and injunctive relief as provided for under Sections 4 and 16 of the Clayton Act (15 U.S.C. secs. 15, 16).

Sunray DX Oil Company and Sun Oil Company, two similarly structured corporations, prior to their merger were highly integrated oil companies. The merger, effective on October 25, 1968, eliminated all competition previously existing between the companies, and created a corporation with assets in excess of two billion dollars. As a result of the merger, Sun Oil increased its rankings among Fortune's 500 largest industrials to 42 in terms of sales and 28 in terms of assets.

As a direct result of the Sunray DX-Sun Oil merger, the petitioner, Ken Mans, was terminated. He had been with Sunray DX since 1954, and through a number of promotions, he was, at the time of the merger, the manager of compounder-blender sales and was earning $1,360 per month. The first public announcement of how this merger would affect employees came out in November, 1969. Sun Oil announced that 900 jobs in Tulsa would be eliminated (Tulsa World, November 4, 1969 at p. 1). The petitioner, by affidavit, stated to the trial court that he was aware of Sun Oil's plan to reduce its work force by some 3,000 to 4,000 employees.

Sun Oil offered the petitioner a chance to transfer from Tulsa to the Dallas, Texas office. The transfer offered, however, was for a lower job classification with lower wage scale and with lesser responsibility. Instead of accepting this lesser job, the petitioner elected to challenge the merger under the antitrust laws. This decision was made in spite of the fact that it caused the petitioner to be denied the severance pay given to other employees terminated by reason of the merger.

2. The Trial Court

The complaint in *Mans* was filed on April 30, 1970. On May 20, 1971, the trial court entered judgment (Appendix E) on the ground that employees do not have standing under the antitrust laws. The court concluded that the plaintiff was *only a salaried employee* and *not a commission sales agent* with a competitive territory upon which his earnings depended.

3. The Appeal

On January 17, 1973, the Court of Appeals for the Tenth Circuit affirmed and filed a *per curiam* opinion. The Court held that under *Reibert et al.* v. *Atlantic Richfield et al.*, a salaried employee, as opposed to an employee paid on a commission basis, lacked standing to sue under Sections 4 and 16 of the Clayton Act.

THE AMERADA-HESS MERGER

1. Facts of Case

This class action was filed on February 24, 1970 in the United States District Court for the Northern District of Oklahoma by the petitioner, Del Jeannene Jobe, for herself and on behalf of all other employees similarly situated. It challenges the legality of the merger of Amerada Petroleum Corporation and Hess Oil and Chemical Corporation under the antitrust laws and seeks treble damages and injunctive relief as provided for under Sections 4 and 16 of the Clayton Act (15 U.S.C. secs. 15 and 26).

Hess Oil and Chemical Corporation ("Hess") was merged into Amerada Petroleum Corporation ("Amerada") on June 20, 1969. Prior to the merger, Hess was an

integrated oil company engaged in some exploration and production but principally involved in refining and marketing. During 1968, it had sales of about $460,000,000, and as of December 31, 1968, its assets amounted to about $491,000,000. Amerada had been principally engaged in domestic and foreign exploration and production. During 1968, its sales totaled about $256,000,000, and as of December 31, 1968, its assets amounted to $354,000,000.

Prior to the merger, Amerada had no import quota; therefore, to satisfy a domestic market, it was active in domestic exploration and production. Following the merger, the large import quota of Hess allowed the company to curtail domestic production. This is reflected in the fact that many of the employees terminated had previously worked in the area of production. In one reorganizational study, it was shown that the geophysical crews could be reduced from 160 to 35.

As a direct result of the Amerada-Hess merger, the petitioner, Del Jeannene Jobe, was terminated. She was a draftsman in the geophysical department of Amerada and was terminated on February 2, 1970. After the petitioner filed this action, two other employees, terminated on February 2, 1970, joined the suit as plaintiffs. Robert R. McDole was first employed by Amerada in September, 1950 and worked as a geophysical draftsman. Roy E. Michael, the second person to join this suit, was also a draftsman in the geophysical department of Amerada.

2. The Trial Court

The complaint filed in this case was filed on February 24, 1970. After extensive discovery by the plaintiff, the defendants, on December 22, 1971, filed a motion for summary judgment on the ground that claimed loss of employment does not constitute injury to business or prop-

erty. On January 11, 1972, the Magistrate issued a recommended order sustaining this motion (Appendix H). This recommended order was approved without comment by Judge Barrow on March 20, 1972 (Appendix I).

3. The Appeal

On February 6, 1973, the Court of Appeals for the Tenth Circuit affirmed and filed a *per curiam* opinion (Appendix G). Following *Reibert et al.* v. *Atlantic Richfield et al.*, a salaried employee, as opposed to an employee paid on a commission basis, lacked standing to sue under Sections 4 and 16 of the Clayton Act.

REASONS FOR GRANTING THE WRIT

I. The decision below is inconsistent and contrary to established precedent.

Decisions from this Court and other Courts clearly support the standing of employees under the antitrust laws. The lower Court in the case refused to follow this precedent, or distinguished cases on totally spurious grounds. Any person injured in his business or property by reason of anything forbidden by the antitrust laws has standing under Section 4 of the Clayton Act to sue for treble damages.

In *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251, 264 (1972), this Court approved and adopted the definition of the terms "business or property" as stated in *Roseland* v. *Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942) which was that "business or property" included:

> " 'employment or occupation in which a person is engaged to procure a living.' " (*Id.* 419).

The word "business" as used in Section 4 of the Clayton Act was held in *Roseland* to signify "that which habitually busies; or engages time, attention or labor, as a principal serious concern or interest." *Roseland, supra* at 419.

A man's job clearly fits the definition of "business" that this Court approved in *Hawaii*. He works at his job as a principal serious concern and interest to support himself and his family as he is morally and legally obligated to do. This Court also recognized that salaried employees had standing under the antitrust laws in *Perkins* v. *Standard Oil Company*, 395 U.S. 642 (1969), a decision relied upon by the Court in *Bay Guardian Co.* v. *The Chronicle Publishing Co.*, 340 F.Supp. 76 (N.D. Calif. 1972).

Likewise this Court upheld the standing of employees in *Radovich* v. *National Football League*, 352 U.S. 445 (1957) and *Flood* v. *Kuhn*, 407 U.S. 258 (1972). Yet the lower court in the present case refused to follow these cases and denied standing to the petitioner-employees. The Tenth Circuit also refused to follow *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) and *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967). In substance, the lower Court reasoned that these cases did not apply to a mere salaried employee.

In *Roseland* and *Dailey*, the employees involved were salesmen who, according to the Tenth Circuit "were quasi-businessmen operating in a market carved out by their own aggressiveness and salesmanship qualities." (Appendix A, p. A8). On the other hand the petitioner was described as a mere salaried employee who did not operate out of any specific market. Based on this spurious distinction, an aggressive salesman would have standing under the antitrust laws; however, access to the Courts and all antitrust relief would be denied to research technicians, map draftsmen, and other *mere salaried employees*. The reason given by the lower Court for refusing to follow *Radovich* and *Nichols* is equally fallacious.

If the strained distinctions of the Tenth Circuit are allowed to stand, thousands of workers who have faithfully served their corporate employers for many years, will be denied access to the Courts and the lawful protection of the antitrust laws for all employees. The Tenth Circuit has created "an anomaly and an aberration" that will surpass the distinction between baseball and football. *Flood* v. *Kuhn*, 407 U.S. 258 (1972). When access to the Courts depends upon the job description given a man or upon the method by which he is paid, we will have removed the blindfold from the symbol of justice. Thereafter, value judgments, rather than law will control judicial decisions.

When Congress allowed "any person injured in his business or property" by an antitrust violation to sue for treble damages, was it extending protection to commission salesmen and football players and excluding all other employees? Regardless of the job description, the method for computing compensation, or the amount of compensation, the fact is that an employee is an employee. Whether a salesman, geologist, secretary, research technician, football player or other, they are all people living in one society; faced with similar responsibilities; and sharing in the same aspirations. Their job is their "business" and is the vehicle through which they satisfy their obligations to society and to their families.

Reviewing all of the judicial precedent on the question involved in this case, the Court, in *Vandervelds* v. *Put & Call Brokers & Dealers Ass'n*, 344 F.Supp. 118, 153 (S.D.N.Y. 1972), observed: "Until the last decade, Courts denied standing to employees seeking to recover salary lost when their employers' business was injured by an antitrust violation." However, as the Court continued: "More recent decisions have accorded an employee standing."

We have come to recognize more fully the critical importance of the antitrust laws to all American citizens and to all employees. The unfortunate distinction of the Tenth Circuit which classifies employees cannot be allowed to stand. As Mr. Justice Marshall declared in his opinion filed in *Flood* v. *Kuhn*, 407 U.S. 258, 292 (1972):

> "The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as to football players, lawyers, doctors, or *members of any other class of workers.*" (Emphasis added).

II. The lower Court erroneously applies and expands the "directness rule".

One must show that his "business or property" was injured "by reason of anything forbidden in the antitrust laws" to support a claim under Section 4 of the Clayton Act (15 U.S.C. sec. 15). The lower court ruled that the employees did not satisfy this causation language because they could not show that the injury resulted from a *lessening of competition.* With this serious misreading of the language of Section 4, the lower court created a loophole through which most antitrust violators can escape.

Causation, under Section 4, is measured through the words "by reason of anything forbidden in the antitrust laws." A reading of the antitrust statutes shows that *the forbidden act* involved in this case *is the merger* and *not the lessening of competition.* A restraint of trade, standing alone, would not be a violation of Section 1 of the Sherman Act (15 U.S.C. sec. 1). The forbidden act under this section of the antitrust laws is any *Contract* that restrains trade. Likewise, a lessening of competition is not illegal under Section 7 of the Clayton Act (15 U.S.C. sec. 18). The forbidden act under this antitrust provision is the *merger.*

The lower court concedes that the employees were terminated as a direct result of the merger alleged to be illegal and forbidden under the antitrust laws. A clear inconsistency stated by the Tenth Circuit is as follows:

> "At best, appellant's discharge was no more than an outgrowth of the alleged *unlawful merger.* He has failed to show the necessary directness of injury caused by the *illicit acts.*" (Appendix A, p. A12) (Emphasis added).

The inconsistency is illustrated by the emphasized words of the lower court—admitting that the employees were terminated by reason of an *unlawful merger*, but then holding that injury was not a direct result of the *illicit acts*. Under the antitrust laws, the unlawful merger is the illicit or forbidden act. With all due respect for the lower court, its explanation of the statutory requirements of Section 4 is difficult to accept. There appears to be a basic misunderstanding that, at least in this case, reaches great proportions. The lower court states:

> "Terminations of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency." (Appendix A, p. A11).

We are not concerned with a legal merger in this case; to resolve the issue of standing the illegality of the merger is presumed. It is obvious that if the merger were not illegal, the employees would recover nothing. This surely cannot mean, however, that because an employee may be terminated following a legal merger, he is without standing to sue if the merger is illegal. The admitted right of an employer to terminate employees is based on the assumption that the decision to terminate is reached independent of an antitrust violation. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *United States* v. *Parke Davis and Company*, 362 U.S. 29 (1960); *Simpson* v. *Union Oil Company of California*, 337 U.S. 13 (1964).

The error of the lower court is in its conclusion that the alleged injury is indirect and remote unless it attaches to the "lessening of competition". In support of this conclusion, the lower court notes from *Brown Shoe Co.* v.

United States, 370 U.S. 294, 320 (1962) that Section 7 of the Clayton Act was intended to protect *competition*. It was reasoned from this that the injured employees, to have standing, must show that they were engaged in *competition* within the petroleum industry. It stated that a *competitor* of the acquiring or acquired corporation might have standing to bring this action (Appendix A, pp. A10-A11).

Brown Shoe was not accurately interpreted by the Tenth Circuit. What this Court actually said in *Brown Shoe* and again in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) was that the purpose of Section 7 of the Clayton Act was to protect competition, *not competitors*. This means that the enforcement of the antitrust laws cannot be left to competitors as the Tenth Circuit would do. Testimony of competitors that the merger involved in *Philadelphia National Bank* was procompetitive was considered by this Court as having very little probative value since the purpose of the statute was to protect "'*competition*, not *competitors*.'" *United States* v. *Philadelphia National Bank*, *supra* at 367 (emphasis belongs to Court).

As used by this Court, the word "competition" has been in reference to "our fundamental national economic policy". *Philadelphia National Bank*, *supra* at 372. Competition is the economic regulator of all matters *including employment*. The Tenth Circuit uses the word "competition" to exclude from the protection of the antitrust laws all but competitors. When this Court gives little probative value to testimony of competitors, it is difficult to see how private enforcement under Section 4 can be limited to competitors. These are unreliable private attorney generals since the competitors are responding by entering into

merger themselves. For example, this Court now has six competing companies to which the Tenth Circuit would leave private antitrust enforcement—Sinclair was merged into Atlantic Richfield; Sunray DX was merged into Sun Oil; and Hess Oil merged with Amerada Petroleum Corporation.

Reliance by the Tenth Circuit on *Billy Baxter Inc.* v. *Coca-Cola Company*, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971), and *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), cert. denied 406 U.S. 930 (1972) is misplaced. These cases involved the standing of a franchisor and a landlord. Nevertheless, the petitioner submits that the directness requirements of *Billy Baxter* and *Calderone* are satisfied in this case.

Even if the lower court was considered correct about measuring causal connection to the "lessening of competition", the petitioner satisfies the directness requirement. Corporations can compete only through the actions of people—the employees. Consequently the "lessening of competition" resulting from a corporation merger can be measured by the resulting reduction in the number of employees. This can be seen even from the observations of the lower court. When it stated that the termination of employees is a natural effect of a merger of two similarly structured businesses, it was actually defining the "lessening of competition."

Employees are the most reliable persons to challenge illegal mergers because employees are more directly affected by corporate mergers. Consider: *Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F.2d 994, 1000-1004 (D.C. Cir. 1966).

III. The lower Court ignored the clearly expressed congressional policy supporting the standing of employees.

Although thoroughly briefed, *the lower court gave no attention to the Congressional expressions and policy* that allows employees injured by an illegal merger to seek treble damages and injunctive relief. From the very inception of federal antitrust laws, Congress recognized the causal connection between economic concentration and employees. As noted in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945): Congress in 1890 sought to put an end to great aggregations of capital "because of the helplessness of the individual before them". 21 Cong. Rec. 2457 (1890) (remarks of Senator Sherman).

Senator George, speaking of the treble damage provision in the Sherman Act, stated that this section gave standing to the "farmer, mechanic, *laborer* and consumer". 21 Cong. Rec. 3150 (1890). When the Clayton Act was passed in 1914, there was strong Congressional support for private antitrust suits. Senator Borah stated that: "There could be no safer guardian for the Sherman Anti-trust law than the hundreds and thousands of people who are injured by these monopolies." 51 Cong. Rec. 15986 (1914) "Because you are threatening to take money out of his pockets, the offender will begin to open his eyes and show greater obedience for the law." 51 Cong. Rec. 16275 (1914) (remarks of Congressman Webb).

Persons recognized as the ones suffering the most from the great combinations of wealth were identified as "the consuming public", "the struggling poor of our country", *"the employee who loses his job"*, and the "citizens and their children" who desire the right to enter business. 51 Cong. Rec. 16043 (1914) (remarks of Senator Norris); 51 Cong. Rec. 9088 (1914) (remarks of Congress-

man Mitchell). In the final report of the Temporary National Economic Committee of the extensive study of economic concentration, it was stated that the degree of economic concentration was so great that,

> "the opportunity of those individuals who will constitute the next generation will be completely foreclosed unless"

the trends are reversed. Temporary National Economic Committee, Investigation of Concentration of Economic Power, S. Doc. 35, 77th Cong., 1st Sess., 9 (1940) (Referred to hereafter in this petition as TNEC Report.)

The merger trend has already created an economic barrier for any individual to freely enter into many businesses. Within the petroleum industry one can enter business as a service station operator; however, as a producer, refiner and large scale marketer of petroleum products, the market is preempted by industrial giants. About the only thing that an individual can realistically expect is advancement and retirement as an employee. The lower court is allowing large corporations to destroy even this employment opportunity.

Congress provided protection to employees through the antitrust laws. As stated in the TNEC Report: "It is the fundamental duty of every society which is devoted to the principles of popular government to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man." TNEC Report at 6. And as President Roosevelt said on the subject of economic concentration and employment:

> "No people, least of all a democratic people, will be content to go without work or to accept some standard of living which obviously and woefully falls short of their capacity to produce. No people, least of all

a people with our traditions of personal liberty, will endure the slow erosion of opportunity for the common man, the oppressive sense of helplessness under the domination of a few, which are overshadowing our whole economic life." TNEC Report at 15.

IV. The present case raises important and unsettled questions relating to the reach of the antitrust laws.

When under the Interstate Commerce Act, certain common carrier mergers approved by the I.C.C. were exempt from the antitrust laws (49 U.S.C. sec. 5 (b) (9)), it was recognized by Congress that the employees would be injured. (Hearings before the Committee on Interstate Commerce, United States Senate on S. 1310 and S. 2016, 76th Cong., 1st Sess. 387 (remarks of Tom M'Grath, 1939); H. Rept. 1217, Transportation Act of 1939, 76th Cong., 1st Sess. 12 (1939).) It was noted in the debates that 80% of the savings affected by consolidation was taken out of the pockets of railroad workers. 84 Cong. Rec. 9883 (1939).

The House passed the Harrington Amendment to protect these employees:

> "Provided, however, that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9881 (1939);

n conference, the Harrington Amendment was substituted y the present wording of the employee statutory protecon. H. Rept. No. 2832, Conference Report on Transportaon Act of 1940, 76th Cong. 3rd Sess. 68-69 (1940).

Section 5(2) (f) of the Interstate Commerce Act imses upon the Commission a positive duty to protect the

interest of the railroad employees affected. *Norfolk and Western Railway Company* v. *Nemitz*, 92 S.Ct. 185 (1971). The statute provides that:

> "In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment. . . ." (49 U.S.C. sec. 5 (2) (f)).

Following this statutory mandate, the Commission withheld approval of the agreement between Great Northern and Northern Pacific until the 5,200 employees scheduled to be terminated had received "guarantees and job assurances for the rest of their working lives." Motion to affirm filed by I.C.C. at p. 7, *United States* v. *I.C.C.*, 396 U.S. 491 (1970).

The question that this Court must decide is: *Would Congress provide explicit protection to employees affected by a legal merger, and deny protection to all other American workers who are displaced or affected by an illegal merger*? It would appear reasonable to assume that Congress expected employees to be protected by the forces of free competition. The special protection for railroad employees was necessary because Congress reduced competition where railroads were concerned. Previously, the employees of the Great Northern and Northern Pacific had received protection through the preservation of free competition. *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904).

A related question that this Court must decide is whether employees are entitled to an open and unrestrained market. At common law, even an employee

terminable at will had a right to an "open market". *Huskie* v. *Griffin*, 75 N.H. 345, 74 Atl. 595, 596 (1909). ". . . one who interferes with this free market must justify his acts or respond in damages." *Id.* at 597. The Court in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332, 335-336 (7th Cir. 1967) indicated that much the same was true under the antitrust laws. It stated that:

> ". . . agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also . . . impair full and free competition in the supply of a service or commodity to the public." *Id.* at 335-336.

An open and unrestrained market is imperative to employees who must, according to the principles of the "work ethic", accept and follow the competitive directive. S. DeGrazia, The Political Community, A Study of Anomie, 51 (1948). The obligation to work is deep rooted in the make-up of men. Evolving from the religious teachings of Luther and Calvin, who preached that work was a form of serving God, a moral obligation to work was emplanted in man. A. Tilgher, Homo Faber, Work Through The Ages, 49, 58 (Trans. I. Fisher 1958). Idleness was "shunned as a deadly sin." *Id.* at 59.

With the Renaissance and the industrial revolution, work took on a new character: "the idea of work for its own sake". Tilgher, *supra* at 71. In a capitalistic society, it was only by work that man found his nobility and worth. "His whole code of ethics is contained in one precept, 'work'!" *Id.* at 134. An American without a job is a misfit. "To hold a job means to have status, to belong in the way of life." *Id.* at 46. In fact, as one writer notes: "Work itself keeps a man 'normal'." E. Bakke, Citizens Without Work, 248 (1940).

Man not only has a deep moral obligation to work, there are legal obligations that require him to work. Adriano Tilgher, recording the history of labor, observed that work is its own reward, and that because man ought to live by his own works, "*the state has a right to insist that everyone do work as much as he can.*" A. Tilgher, *supra* at 93-94 (Emphasis added). The laws of the State of Oklahoma offer an example of what Tilgher was saying. In Section 3 of Title 32, Oklahoma Statutes, 1971, it is provided:

> "The husband must support himself and his wife out of the community property or out of his separate property *or by his labor.*" (Emphasis added).

And at Title 10 Oklahoma Statutes 1971, sec. 12, it is provided:

> "It is the duty of the father and the mother of any poor person *who is unable to maintain himself by work*, to maintain such person to the extent of their ability." (Emphasis added).

Society does not assume the primary responsibility for the economic support of its people. To insure this support, the state exercises its right to insist that people work. From childhood, we have been taught that "the poor are poor because by being idle or unemployed they violate the competitive directive." S. DeGrazia, *supra* at 51. We are slow to feed the poor because of the deep belief that everyone ought to live by his own works. But how can man be obligated to work and support his family if corporations are allowed to violate the antitrust laws and in the process destroy thousands of jobs?

Congressman Kelley, in the Clayton Act debates, declared that big business through its "art of trickery and debauchery" has brazenly defied the spirit of the laws

made to protect the public. 51 Cong. Rec. 9087 (1914). He saw no room for compromise, and called for a halt to the "evils which have brought concentration of wealth and diffusion of poverty." 51 Cong. Rec. 9087 (1914). People stay out of poverty by working; however, jobs, in the United States, are produced only through free competition.

Adriano Tilgher, who recognized that, under the work ethic, the state has a right to insist that everyone work, also observed that:

> *"The state has the corresponding duty to assure to all its citizens the right to work."* A. Tilgher, *supra* at 94 (Emphasis added).

This obligation is satisfied by the state by keeping unrestrained the forces of free competition. Congress called for a halt to corporate mergers and the resulting increases in economic concentration in an effort to preserve an open market for employees. As stated in the TNEC Report at 6:

> "It is the fundamental duty of every society . . . to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man."

By denying access to the courts to employees in this present case, the lower court has created a jurisprudential aberration. Man is still required, morally and legally, to work; however, he is denied the right to protect his job against the attack of corporations that defy the antitrust laws. This Court must decide if the antitrust laws offer any protection to employees.

V. Issues in this case are important to a substantial segment of American Society.

Rejecting the *parens patriae* suit in *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251, 265 (1972), this Court stated that: "Private citizens are not as powerless . . . as the State suggests." Private citizens, in order to enhance the efficacy of private actions, were advised to "combine their limited resources to achieve a more powerful litigation posture." *Hawaii, supra* at 266. The petitioners in these cases followed this course which is the only effective way to challenge multi-billion dollar aggregations of capital.

The issues in this case do not involve only a single employee; all the employees included in the class are affected. All working and unemployed Americans will be equally affected by the decision in this case. Because competition is the economic regulator, jobs and job opportunities are produced and preserved through the forces of free competition. Corporate mergers are now the most serious threat to these competitive forces. Today, unemployment and poverty pervades this Country principally because of the erosion of competition through the continuing merger trend.

There will be many more corporate mergers in the future; and consequently many more employees terminated. More people will be cast into poverty and those born in poverty or to be born in poverty will find it harder to escape. Only through jobs and work can a person escape the pain of poverty and the indignity of welfare. When left unrestrained by illegal corporate mergers, competition will produce jobs.

Corporate mergers will continue in the future because it costs a corporation nothing to violate Section 7 of the

Clayton Act. Since the Clayton Act carries no criminal sanction, corporations are willing to take their chances with the Government. Even if their merger is challenged by the Government, the corporation can reap enormous windfall profits principally at the expense of the employees. The lower court in this case has now created a legal sanction for this practice. It stated that the termination of employment "is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency." (Appendix A, p. A11).

This Court has done much in defining the personal rights and liberties of the people of America. What good is this cherished liberty, guarded so vigilantly by this Court, when giant corporations are permitted, for the sake of higher profits, to destroy jobs and therefore our economic freedom?

What good are personal rights and liberties when the citizens of this Country are committed to economic slavery "from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the Country, including the production and sale of the necessaries of life." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 83 (1911) (concurring and dissenting opinion of Mr. Justice Harlan).

Employees could organize into large nationwide unions for some protection against the great concentration of economic power in the hands of a few corporations. Congress, however, in passing the Celler-Kefauver Act, expressed opposition to this alternative. H.R. Rep. 1191, 81st Cong., 1st Sess. 13 (1949). It opposed both kinds of concentrated power in the hands of private persons, because such would necessarily lead "to big bureaus in the Government to deal with them." H.R. Rep. 1191, 81st

Cong., 1st Sess. 13 (1949). The Congressional purpose was for jobs to be produced and employees protected by the forces of free competition.

Corporations with their enormous economic power have, however, been allowed to destroy the forces of free competition and escape the penalty of the law. Denying access to the courts to employees for the purpose of defending the competition upon which they still must rely for jobs, corporations have completed their evolution. Large national corporations have long become more powerful than states. "[L]ocal communities and States are no longer economically self sufficient, but are dependent for their commercial and industrial life upon the acts and decisions of persons and organizations beyond their jurisdiction." TNEC Report, *supra* at 5. See also, *Northern Securities Co.* v. *United States,* 193 U.S. 197, 327-328 (1904).

Corporations, with the lower court's opinion, have now gained an advantage over the National government. With access to the courts closed to employees, corporations are free to violate the antitrust laws and engage in wholesale termination of employees, eliminating thereby much of the accumulated retirement benefits. Government and government agencies do not enjoy the same freedom to arbitrarily destroy the rights of people. *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Association of Data Processing Service Organization, Inc.* v. *Camp.,* 397 U.S. 150 (1970); *Barlow* v. *Collins,* 397 U.S. 159 (1970); *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

Congress has taken the position that corporations are not to be allowed to do that which government cannot do. "If the political structure is designed to preserve the freedom of the individual, the economic structure must not be permitted to destroy it." TNEC Report, *supra* at 5.

Economic organizations are "called into existence by men to meet their material needs"; they are therefore "justified only to the degree in which they serve the entire community." *Id.* "Like government organization, business organization has no right or function to control the activities and the lives of men." *Id.*

The evolution of corporations was completed with the opinion of the Tenth Circuit issued in this case. With this decision, corporations are permitted to dominate the lives of people. Unless the lower court opinion is set aside, the people of this Country must submit their lives to the will of the economic corporate giants.

When a poor man steals a loaf of bread because he is hungry, he is vigorously prosecuted and sent to jail. Corporations that show contempt for the law must be prosecuted with equal vigor if we are to endure as a legal society. Based on the lower court's opinion, corporations can ignore with impunity the very laws designed to protect employees. These employees and other little people, not needed by these merging corporations, have been left to be trampled under at the will of a few select and economically powerful men.

Congress observed that the monopolist that takes away a man's job takes away his life. TNEC Report, *supra* at 6. When courts sanction this travesty by closing their doors to employees, the personal suffering becomes intolerable. As the poor man is prosecuted for violating the law, corporations that violate the antitrust laws must be prosecuted. Where illegal corporate mergers are involved the only effective prosecution is the private antitrust suit.

The criminal sanction was deleted from the Clayton Act by Congress in an effort to avoid the strict construction rule attached to penal statutes. There was some ob-

jection to this deletion; however, the private treble damage relief provided was considered to be more effective than the criminal prosecution. 51 Cong. Rec. 16319 (1914) (remarks of Congressman Floyd).

The lower court has made a tragic mistake that can now be corrected only by this Court.

CONCLUSION

For all the above reasons, this writ should be granted and the judgments of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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918—932-4661
Attorney for Petitioners

APPENDIX A

United States Court of Appeals
Tenth Circuit
Office of the Clerk
Denver, Colorado 80202

January 8, 1973

Howard K. Phillips
Clerk

Telephone
303-837-3157

Stan P. Doyle, Esquire
Attorney at Law
P. O. Box 4470
Tulsa, Oklahoma 74104

Re: No. 72-1283, Delbert C. Reibert, etc. v.
Atlantic Richfield Company,
et al.

Dear Mr. Doyle:

Enclosed is a copy of the opinion of the Court in the above case. Judgment in accordance with that opinion has been entered today.

Very truly yours,

Howard K. Phillips, Clerk
By: /s/ Lavon M. Irlbeck
Lavon M. Irlbeck,
Deputy Clerk

/li
Enclosure

cc: Joseph W. Morris, Esquire, Attorney at Law, P. O. Box 2040, Tulsa, Oklahoma 74102

Otis Pratt Pearsall, Esquire, Attorney at Law, One Wall Street, New York, New York 10005

Donald A. Bright, Esquire, Legal Department, Atlantic Richfield Co., 717 Fifth Avenue, New York, New York

Richard B. McDermott and D. E. Hammer, Esquires, Attorneys at Law, 1300 National Bank of Tulsa Building, Tulsa, Oklahoma 74103

William E. Jackson, Esquire, Milbank, Tweed, Radley and McCloy, One Chase Manhattan Plaza, New York, New York.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY, 1973, TERM

No. 72-1283

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,
Plaintiffs-Appellants,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(District Court No. 69-C-233)

(Filed January 8, 1973)

Stan P. Doyle, Tulsa, Oklahoma, for Plaintiffs-Appellants.

Otis Pratt Pearsall, New York, New York (Richard B. McDermott and Donald E. Hammer, Tulsa, Oklahoma; Jerome G. Shapiro, John A. Donovan and Donald A. Bright, New York, New York, on the brief), for Defendants-Appellees.

Before PHILLIPS, HILL and HOLLOWAY, United States Circuit Judges.

HILL, Circuit Judge.

This is an appeal from an order by the United States District Court for the Northern District of Oklahoma

granting defendants-appellees summary judgment on their motion to dismiss plaintiffs-appellants' suit for violations of Sherman 1 (15 U.S.C. § 1) and Clayton 7 (15 U.S.C. § 18).

Appellant Reibert had been employed by Sinclair since 1952. Originally employed as a draftsman, he subsequently held various jobs and was working as a research technician at the time of his termination. The circumstances surrounding his discharge began when Atlantic Richfield Company and Sinclair reached a preliminary agreement to merge. Approval by the boards of directors was forthcoming, and finally adoption by the stockholders.

The merger was temporarily halted when the Department of Justice commenced an action against Atlantic and Sinclair in the United States District Court for the Southern District of New York challenging the merger under Section 7 of the Clayton Act. The complaint charged the merger might substantially lessen competition or create a monopoly in the selling of gas in four geographic regions. Ultimately Sinclair was forced to divest itself of all marketing properties in the northeastern and southeastern states.

Once the court accepted Sinclair's divestiture, the merger was consummated. Shortly thereafter, Reibert was discharged. No evidence has been submitted intimating that appellant's discharge was for any reason other than the duplication in jobs occasioned by the merger. The merger's reverberations caused 4000 employees to be terminated or forced into early retirement within one year of consolidation. Appellant filed this class action on behalf of all employees and the employment agencies which regularly had provided temporary help to Atlantic Richfield and Sinclair.

Appellant alleges, inter alia, that Atlantic and Sinclair entered into a mutual merger agreement which is in restraint of trade, in violation of Section 1 of the Sherman Act. Atlantic's acquisition of Sinclair also violated Section 7 of the Clayton Act in that it might substantially lessen competition or tend to create a monopoly in the petroleum industry. Treble damages were sought under Section 4 of the Clayton Act (15 U.S.C. § 15) and injunctive relief under Section 16 (15 U.S.C. § 26) of the same Act.

On December 1, 1969, appellant filed a motion for summary judgment seeking to dispose of certain legal issues, including standing of employees to sue. The trial judge denied this motion. Atlantic subsequently filed a motion for summary judgment on the issue of standing which was sustained on grounds that: (1) appellant's injury, if any, was too indirect to be actionable under Clayton 4; and (2) appellant was not injured in his business or property by anything forbidden by antitrust laws.

Numerous issues were raised by appellant on appeal, but our decision that he lacks standing is dispositive; therefore no attempt will be made to answer the other issues.

Appellant asserts that employees have standing to sue whenever the effect of an illegal merger is to injure them. The issue boils down to whether or not antitrust laws are directed toward employees injured by an alleged illegal merger.[1]

---

1. Clayton 4 provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained. . . ." Clayton 16 provides: "Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ."

"Directness of injury" has been a phrase confronting the courts on numerous occasions. For example, our own court, in Nationwide Auto Appraiser Service Co. v. Association of C. & S. Co., 382 F.2d 925 (10th Cir. 1967), determined that a franchiser complaining of an antitrust combination directed at its franchisee suffered only "indirect" or "remote" damages. *See also* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied,* 401 U.S. 923. A non-operating landlord of theaters allegedly used by its tenant and various motion picture distributors and exhibitors in furtherance of an antitrust conspiracy to restrain the trade of competing distributors and exhibitors has been denied standing for failure to come within the "target area" of the alleged conspiracy. Calderone Enter. Corp. v. United States Theatre Circuit, 454 F.2d 1292 (2d Cir. 1971). Standing has been denied a patent owner charging derivative harm from a conspiracy directed against its licensees. Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied,* 350 U.S. 936 (1956). Stockholders of a corporation are not within the protected area merely because an unlawful conspiracy has caused injury to the corporation. Campo v. National Football League, 334 F.Supp. 1181 (E. D. La. 1971); Ash v. International Business Machines, Inc., 353 F.2d 491 (3d Cir. 1965); Former Stockholders of Barr Rubber Products Co. v. McNeil Corp., 325 F.Supp. 917 (N.D. Ohio 1970), *aff'd mem.,* 441 F.2d 1169 (6th Cir. 1971). Neither is a creditor suing to recover damages to his debtor's business within the antitrust laws' area of protection. Walder v. Paramount Publix Corp., 132 F.Supp. 912 (S.D.N.Y. 1955).

Standing to sue by employees presents yet another class seeking relief under Clayton 4 and 16. Appellant contends he satisfies the directness test propounded in Nationwide Auto Appraiser Serv. v. Association of C. &

S. Co., supra. He was employed by Sinclair for 17 years. He was not fired because of inability to handle the job, but as a result of an unlawful merger. For every wrong there should be a remedy; Clayton 4 and 16 provide this remedy to employees discharged by an alleged illicit merger.

Appellant states that employees have standing because employment is business or property as defined in Clayton 4. Supporting this assertion he cites Hawaii v. Standard Oil Company of California, ... U.S. .... (1972). This case concerns the state's right to sue a party for antitrust violations under the *parens patriae* theory. Although the Supreme Court holds that Section 4 of the Clayton Act does not authorize a state to sue for injury to its general economy resulting from alleged antitrust violations, the Court approves a definition of "business or property" enunciated in Roseland v. Phister Manufacturing Co., 125 F.2d 417 (7th Cir. 1942). Business or property is defined in Roseland as "employment or occupation in which a person is engaged to procure a living." Roseland v. Phister Mfg. Co., supra at 419.

Roseland concerns antitrust violations by three corporations engaged in manufacturing and selling fire prevention equipment and fire extinguishers. Plaintiff was a salesman for one of the defendant companies working on a commission basis. The three defendant companies combined their activities for the purpose of, inter alia, suppressing competition in interstate commerce, conspiring to monopolize the commerce, eliminating fair and lawful competition, and dividing customers and purchasers. Plaintiff was accorded standing because his work was that of a sales agent possessing an exclusive territory of several states with an established clientele. Such employees fall within the definition of business or property. More recent cases supporting this view include Daily v. Quality

School Plan, Inc. 380 F.2d 484 (5th Cir. 1967) (area supervisor of magazine subscription company injured in his business or property by a prohibited corporate acquisition); and Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967) (no-switching agreement by which each publisher agrees not to employ a former employee of the other until six months after termination of former employment constitutes injury to employee in his business or property).

We are not in disagreement with the above cited cases; however, we do not believe they are applicable to the situation here. The Supreme Court in Hawaii was concerned with the state's standing to sue for injuries to its general economy resulting from antitrust violations. Although approving the standing definition in Roseland, we do not feel the Court expanded the definition to include situations factually different from that in Roseland. In both Roseland, supra, and Dailey, supra, the employees worked on a commission basis. They in essence were quasi-businessmen operating in a market carved out by their own aggressiveness and salesmanship qualities. Thus when their employers engaged in anti-competitive practices, the employees were directly injured by these violations.

For appellant to satisfy the business or property prerequisite, he must demonstrate that his job is a commercial venture or enterprise. Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F.Supp. 641, 644 (D.C.N.J. 1960); *see also* Peller v. International Boxing Club, 227 F.2d 593 (7th Cir. 1955); Brownlee v. Malco Theaters, 99 F.Supp. 312 (W.D.Ark. 1951). Appellant did not operate out of a specific market nor did his job compel establishing a clientele. In no way could his job be construed as a venture or enterprise within the market area endangered by the merger.

Appellant asserts that standing has been granted employees in numerous cases. The Nichols v. Spencer International Press, Inc., supra, case allowed an employee standing to attack anti-competitive practices by his employers. In Radovich v. National Football League, 352 U.S. 445 (1957), plaintiff sued for treble damages and injunctive relief under Clayton 4. Plaintiff contended there was a conspiracy by the National Football League, the effect of which was to prevent his employment in organized football. The Supreme Court determined that if plaintiff has suffered injury and satisfies the test under the Sherman Act's general prohibiton of unreasonable restraints of trade, then his pleadings are sufficient to satisfy the jurisdictional requisites. *See also* Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), *aff'd* ..... U.S. ..... (1972). Once again these cases are inapposite. Each case alleges antitrust violations directed against the blackballed party. Appellant Reibert is not faced with a similar problem. If there is any antitrust violation, it is directed toward the petroleum industry. Appellant is not among those (the buyers and sellers constituting the market) engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect. Billy Baxter, Inc. v. Coca-Cola Co., supra.

Antitrust violations admittedly create foreseeable ripples of injury to individual stockholders, consumers and employees, but the law has not allowed all of these standing to sue for treble damages. Billy Baxter v. Coca-Cola Co., supra. The aggrieved party must satisfy the "by reason of" and/or "by" requirements found in Sections 4 and 16 of the Clayton Act, respectively. This prerequisite boils down to complainant proving that the antitrust violations are the proximate cause of his injury. Two elements are necessary to demonstrate proximate

cause: (1) there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage; and (2) that the illegal act is linked to a plaintiff engaged in activities intended to be protected by the antitrust laws. Billy Baxter, Inc. v. Coca-Cola Co., supra. Appellant fails to satisfy either requirement. The first element, causal connection between violation and injury, is lacking because appellant cannot show that any antitrust violations directly injured him. He has suffered no direct injury as a result of the prohibited lessening of competition. Conference of Studio Unions v. Lowe's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); Peterson v. Borden Co., 50 F.2d 644 (7th Cir. 1931); Rayco Mfg. Co. v. Dunn, 234 F.Supp. 593 (N.D.Ill. 1964). In Peterson v. Borden Co., supra, stockholders were allegedly fraudulently induced to sell their stocks to majority stockholders for less than its value. Subsequently the majority stockholders sold the entire assets to a corporate competitor. The minority stockholders sued to recover damages for injury to their property caused by alleged violations of the antitrust laws resulting from the sale of stock by majority stockholders to a competitor. The court denied recovery because a stockholder of an absorbed corporation who parts with his stock for less than its actual cash value cannot attribute his loss to substantial lessening of competition or creation of a monopoly. Any injury sustained is through fraud by majority stockholders, not lessening of competition.

In another case concerning the causal relationship between antitrust violations and injury, a franchisee sued B. F. Goodrich for acquiring all of franchiser's stock, thereby creating a monopoly in violation of Section 7 of the Clayton Act. Franchisee alleged that by the illegal

acquisition, he was prevented from purchasing merchandise from competing suppliers. The court denied him standing because he was unable to relate the injury to a lessening of competition or monopoly. Although a competitor of the acquiring or acquired corporation might have standing to bring such an action, the franchisee was neither foreclosed from selling to the franchiser nor was he a customer foreclosed from receiving an adequate supply of merchandise. Rayco Mfg. Co. v. Dunn, supra.

Appellant in the instant case is confronted with the same problem. If there has been a wrong, appellant cannot show that it results from the lessening of competition. Termination of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency. As was summed up in Conference of Studio Unions v. Loew's Inc., supra, "the loss of their rights of employment is not a result of any lessening of commercial competition. . . ." *See also* Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir. 1950).

Salaried employees stand on no better grounds with the second proximate cause requirement since they are not within the area of competitive economy protected against unlawful mergers. In Conference of Studio Unions v. Lowe's, Inc., supra, employees sought treble damages and injunctive relief on the theory they had lost employment as a result of a conspiracy in restraint of trade in which their employers participated. The defendants were major motion picture studios who were attempting to drive independent motion picture studios out of business. The court determined that employees must show that more than one purpose of the conspiracy was a restraint of trade, and that an act was committed which harms them. They

must show they are "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.*, 55.

Our court had occasion to determine the proximity necessary for standing to sue in Nationwide Auto Appraiser Serv. v. Association of C. & S. Co., supra. Appellant corporation in that case was organized to sell exclusive territorial franchises to independent businessmen engaged in appraising automobile damage. This corporation provided its franchise holders with business advice and advertising. The appellees were associations whose members were insurance companies. Appellant argued the appellees influenced their members to sponsor one appraiser to handle all their appraisal business. The result was alleged to be an unreasonable restraint on trade resulting in substantial injury to appellant and its franchisees. The court held appellant's damages resulting from defendants' acts were too remote or indirect to allow recovery.

Appellant Reibert's injuries were also too indirect to allow standing. The Sherman Act was enacted to prevent restraint of trade having a significant effect on "business competition." Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940). The Supreme Court felt Section 7, as amended by the Celler-Kefauver bill in 1950, also was enacted to protect competition. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). Appellant's termination of employment does not affect the area legislatively protected. At best, appellant's discharge was no more than an outgrowth of the alleged unlawful merger. He has failed to show the necessary directness of injury caused by the illicit acts. Appellant is not in the area of economy endangered by a breakdown of competitive conditions, and thus lacks standing to sue

Appellants cite Wilson v. Ringsby Truck Lines, Inc., 320 F.Supp. 699 (D.C.Colo. 1970), as authority. This case appears to be in point. Defendant Ringsby was a common carrier transporting goods in Colorado and Wyoming. Plaintiffs were employees of Ringsby who worked as truck drivers and warehousemen. Plaintiffs alleged defendant Ringsby and other common carriers illegally conspired to divide up and control the business between Colorado and Wyoming. The result caused a reduction in wages and other compensation to plaintiffs. Defendant argued, inter alia, lack of standing by plaintiffs-employees. This motion was denied. The trial court's reasoning stemmed from the Clayton 4 language itself: "*Any* person who shall be injured in his business or property. . . ." (Emphasis added). Pointing to the confusion arising from the various interpretations of Clayton 4, the trial court determined the statute's best interpretation was a liberal one. The court distinguished Nationwide Auto Appraiser Serv. v. Association of C. & S. Co., supra, by viewing the special relationships between the parties. In Nationwide, plaintiff-franchiser was incidentally affected by defendants' attack against franchise holders. In Wilson, the contractual relationship between employer and employee is as proximate as that found in landlord-tenant cases, in which standing has been upheld. *E.g.*, Congress Building Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957). With all due respect to the trial court's position, we do not feel the weight of authority is on his side. *See* Billy Baxter, Inc. v. Coca-Cola Co., supra; Calderone Enter. Corp. v. United Artists Theatre Cir., supra; Centanni v. T. Smith & Sons, Inc., 216 F.Supp. 330 (E.D.La. 1963), *aff'd* 323 F.2d 323 (5th Cir.); Conference of Studio Unions v. Loew's, Inc. supra; Martens v. Barrett, 245 F.2d 844 (5th Cir. 1957); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30

F.Supp. 389 (S.D.N.Y. 1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910); Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929); Corey v. Boston Ice Co., 207 F. 465 (D.C. Mass. 1913); Deaktor v. Fox Grocery Co., 332 F.Supp. 536 (W.D.Pa. 1971); Sargent v. National Broadcasting Co., 136 F.Supp. 560 (N.D.Cal. 1955); Walder v. Paramount Publix Corp., supra.

As our court has stated, the "directness rule" appears to be a practical application of the Clayton Act. If the test is outmoded, Congress would have so indicated. In view of the lapse of time without legislative changes, we must assume the rule accords with the intent of Congress. Nationwide Auto Appraiser Serv. v. Association of C. & S. Co., supra.

Affirmed.

APPENDIX B

REIBERT ET. AL. v. ATLANTIC RICHFIELD ET. AL.

FINDINGS AND RECOMMENDATIONS OF MAGISTRATE

(Filed March 20, 1972)

This matter comes on for hearing on this 8th day of December, 1971, before the undersigned Magistrate. The plaintiff appeared by his attorney, Stan P. Doyle, and the defendants appeared by their attorneys, R. B. McDermott, D. E. Hammer and Donald Bright. Upon the various pending motions the Magistrate makes and enters the following findings:

1. In view of the finding and recommendation hereinafter made with respect to defendants' motion for summary judgment, the plaintiff's motion for determination of a class action should be overruled, and certification of a class in this action should be denied.

2. The plaintiff's motion for a pretrial conference with the presence of the court should be, under the current rules of this court, overruled.

3. The plaintiff's motion for an order compelling defendants to complete and serve answers to interrogatories should be passed pending a determination of the several pending motions for summary judgment by plaintiff and by defendants.

4. Plaintiff's renewal of his motion for partial summary judgment, previously denied in this action, should again be denied for that no per se violation of the anti-trust laws has been shown upon undisputed

facts made manifest by the pleadings and affidavits. Accordingly, the said motion should again be overruled.

5. Upon the motion of the defendants for summary judgment the Magistrate finds upon undisputed facts as reflected by the pleadings, preceding discovery, and the affidavits of the parties:

(a) Plaintiff was a salaried employee of the defendant, Sinclair Oil Corporation, who continued briefly in the employ of the merged corporations following their merger, under contract of employment terminable at the will of either employer or employee.

(b) Plaintiff had no other interest or concern in the business of Sinclair Oil Corporation or Atlantic Richfield Company than his employment for personal services.

(c) Plaintiff's employment was unrelated to any of the business operations of the defendants alleged in the complaint to have been restrained by any violation of the anti-trust laws.

(d) Plaintiff was not employed in any activity upon behalf of the defendants or either of them which was within the target area of any restraint alleged in the complaint.

(e) Plaintiff was not injured in his business or property by anything forbidden by the anti-trust laws.

(f) Plaintiff's injury, if any, was indirect, incidental, derivative and remote, and therefore not actionable under Sec. 4 of the Clayton Act (15 U.S.C. 15).

(g) In view of the preceding findings, defendants' motion for summary judgment should be sustained upon the authority of Nationwide Auto Appraiser Service, Inc. v. Association of Casualty and Surety Cos., 382 F.2d 925 (10th Cir. 1967); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (CA-9) cert. den. 342 U.S. 919 (1952); Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183 (CA-2 1970) cert. den. 401 U.S. 923 (1971); Mans v. Sunray DX Oil Co., No. 70-C-140, USDC-ND-Okla. (May 20, 1971); Contreras v. Grower Shipper Vegetable Assn., 1971 Trade Cases, paragraph 73,592 (ND-Calif. 1971); Bywater, et al v. Matshushita Elec. Ind. Co., Ltd, et al, 1971 Trade Cases, paragraph 73,759, and other cases cited in defendants' briefs.

(h) In view of the finding that plaintiff has no standing to sue upon the claims asserted, he has no capacity to represent others who might or might not have claims in the pleaded premises.

IT IS, THEREFORE, RECOMMENDED BY THE MAGISTRATE THAT:

1. Plaintiff's motion for determination of a class should be overruled and certification of a class should be denied.

2. Plaintiff's motion for a pretrial conference with the court should be overruled and denied.

3. Plaintiff's motion for summary judgment or partial summary judgment should again be overruled and denied.

4. The defendants' motion for summary judgment should be sustained and granted and judgment should enter for the defendants.

FILED AND ENTERED this 20 day of March, 1972.

/s/ Morris L. Bradford
Magistrate

Form Approved:

/s/ Stan P. Doyle
For the Plaintiff

/s/ R. B. McDermott
For the Defendants

APPENDIX C

REIBERT ET. AL. v. ATLANTIC RICHFIELD ET. AL.

ORDER

(Filed March 30, 1972)

After reviewing the file and record in this case, I approve the findings and recommendations of the Magistrate.

IT IS SO ORDERED.

The Clerk of the Court shall forward by mail a copy of this Order to each of the attorneys for the above named plaintiff and defendants.

Dated this 20 day of March, 1972.

/s/ Allen E. Barrow
United States District Judge

JUDGMENT

(Filed March 20, 1972)

This action came on for consideration before the Court, Honorable Allen E. Barrow, Chief District Judge, presiding, and the Motion for Summary Judgment by the plaintiff having been denied, and the Motion for Summary Judgment by the defendants having been sustained and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

That the plaintiff take nothing on his complaint, that this action is dismissed on the merits and that the defend-

ants, Atlantic Richfield Company and Sinclair Oil Corporation, recover of the plaintiff, Delbert C. Reibert, their costs of action.

Dated at Tulsa, Oklahoma this 20 day of March, 1972.

/s/ Allen E. Barrow
United States District Judge

Form Approved:

/s/ Stan P. Doyle
For the Plaintiff

/s/ D. E. Hammer
For the Defendants

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY, 1973, TERM

No. 71-1410

KEN F. MANS, individually and on behalf of all persons employed by Sunray DX Oil Company and Sun Oil Company as of the date of merger of these two companies,
Plaintiffs-Appellants,

v.

SUNRAY DX OIL COMPANY and SUN OIL COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D. C. No. 70-C-140)

(Filed January 17, 1973)

Stan P. Doyle, Tulsa, Oklahoma, for Plaintiffs-Appellants

Peter H. Holme, Jr., Denver, Colorado (Holme, Roberts and Owen, Denver, Colorado and Pepper, Hamilton & Sheetz, and John G. Harkins, Jr., and Barbara W. Mather, Philadelphia, Pennsylvania, were on the brief) for Defendants-Appellees

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Before HILL, HOLLOWAY and McWILLIAMS,
Circuit Judges

PER CURIAM

Appellant Mans brought this antitrust suit on behalf of himself and others similarly situated, alleging the unlawfulness of a merger between appellees Sunray DX Oil Company and Sun Oil Company under § 1 of the Sherman Act (15 U.S.C.A. § 1) and § 7 of the Clayton Act (15 U.S.C.A. § 18). Treble damages and injunctive relief were sought under §§ 4 and 16 of the Clayton Act, respectively (15 U.S.C.A. §§ 15 and 26). Mans claimed that he lost his salaried position as a sales manager of various Sunray products as a consequence of the allegedly illegal merger.

The trial court granted summary judgment in favor of Sunray and Sun on the ground that Mans lacked standing to sue. The court concluded that Mans' employment was not within the target area of the allegedly anticompetitive result of the merger. And assuming, but not deciding, that such employment was a property right within the meaning of the statute, the court concluded also that the undisputed facts did not establish that termination of Mans' employment was the direct and proximate result of the merger as a matter of law. The court pointed out that Mans stated he could have continued in employment had he transferred to Dallas, and concluded that Mans' desire to remain in employment in Tulsa was the proximate cause of the termination of employment as a matter of law. For reasons stated below we sustain the trial court's decision on lack of standing to sue and affirm the judgment.

In Reibert v. Atlantic Richfield Company and Sinclair Oil Corp., ... F.2d ....., (10th Cir., filed January 8, 1973), we recently held that a salaried employee lacked standing in a similar suit challenging the lawfulness of a merger under the same provisions of the antitrust laws.

This court held that the employee Reibert failed to satisfy the requirement of § 4 of the Clayton Act for injury to business or property, pointing out that Reibert did not operate out of a specific market and did not have a job compelling the establishment of a clientele. The court also held that requirements under both §§ 4 and 16 of the Clayton Act as to proximate cause were not satisfied. Proximate cause was lacking since there was no causal connection between the alleged antitrust violation and the injury claimed, and the plaintiff employee was not engaged in activities in the area of the competitive economy protected by these statutes.

Our record shows that Mans was a salaried employee earning $1,360 per month just prior to termination of his employment. His salary made up his entire compensation as an employee, and he received no commissions, bonuses or other income from the company. He was the manager of compounder-blender sales, charged with a sales function for these products. He traveled somewhat less than half of the time, covering basically the mid-continent area with frequent trips to several cities in that area and occasional trips elsewhere. However in his job of selling he was not limited in geographic scope.

Under *Reibert* we must conclude that, as a salaried employee in the position he held, appellant Mans lacked standing to sue under §§ 4 and 16 of the Clayton Act. Without deciding the correctness of the trial court's conclusion that appellant's desire as to his place of employment was the proximate cause of the termination of his employment, we nevertheless hold that appellant lacked standing to sue in view of the circumstances of his employment and the *Reibert* decision. Accordingly the judgment is affirmed.

APPENDIX E

MANS ET AL. v. SUNRAY D-X OIL CO. ET AL.

ORDER

(Filed May 20, 1971)

Plaintiff proceeds in this case alleging the existence of a class of persons of which he claims to be representative, seeking relief in the form of damages and injunctions under 15 U.S.C.A. §§ 1, 15, 18, 22 and 26. Plaintiff's claims are as follows:

1. 15 U.S.C.A. § 1. Plaintiff claims that Defendants' agreement by which their merger was effected is a per se violation of this statute because it restrains trade by eliminating a potential employer, creating a division of markets and fixing prices.

2. 15 U.S.C.A. § 15. Plaintiff alleges that his right of employment is his business or property which is protected by this statute from direct injury by Defendants' alleged violations of the antitrust laws. The injury to his claimed business or property is stated to be his loss of employment by Sunray after the merger when Plaintiff refused to accept employment at a higher salary in another city.

3. 15 U.S.C.A. § 18. Plaintiff alleges that Defendants' merger substantially lessens competition and tends to create a monopoly, principally because of the concentration of economic power which resulted from the merger.

4. 15 U.S.C.A. § 22. Plaintiff claims, and Defendants do not dispute, that venue exists in the Northern District of Oklahoma.

5. 15 U.S.C.A. § 26. Plaintiff claims that injunctive relief in the form of divestiture is proper in order to put an end to the violations of the antitrust laws alleged to have occurred because such relief is the only method by which competition existing prior to the merger may be recaptured.

Both Plaintiff and Defendants have moved for summary judgment. Their Motions seek adjudication of the following issues, among others: (1) Whether Defendants' merger is a per se violation of 15 U.S.C.A. §§ 1 and 18, and (2) Whether Plaintiff has standing individually and as representative of the claimed class to maintain this action under 15 U.S.C.A. §§ 15 and 26.

Plaintiff alleges that he was employed by Sunray for a number of years. For the last fourteen years, Plaintiff was employed in Tulsa, Oklahoma selling tank car loads of refined oils to industrial consumers. After the Defendants' merger, Plaintiff was offered employment by the Defendants in Dallas, Texas at a greater salary than he was then earning in Tulsa. When Plaintiff refused to transfer to Dallas, his employment was terminated. Plaintiff alleges that the Defendants' action cost his retirement benefits which would have vested within three years and his salary for the three years. Plaintiff further alleges that Defendants refused to pay him severance benefits in the approximate amount of $21,000.[1] Defendants by Answer admit Plaintiff's employment and the offers of comparable employment in other cities but deny that they deprived him of three years' pay, retirement benefits or severance pay.

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1. The Court would parenthetically note that claims for unpaid compensation due an employee may not be asserted in an antitrust suit according to *Nichols* v. *Spencer International Press, Inc.*, 371 F. 2d 332 (Seventh Cir. 1967).

It is essential to Plaintiffs' case that a violation of the antitrust laws be shown. None of the parties dispute this principle. Thus, the first and perhaps paramount issue presented by the Plaintiffs' Motion is whether the merger constitutes, as Plaintiff claims, a per se violation of 15 U.S.C.A. §§ 1 and 18. It is Plaintiff's thesis in his briefs that mere bigness alone is a per se violation of these statutes. Plaintiff apparently recognizes that no court has so held for, after an interminable discussion of the legislative history, purpose and development of the antitrust laws, he urges this Court to make the "bold move" to establish this concept as decisional precedent, thus anticipating what he thinks the Supreme Court will surely do. Such a move by this Court would not only be "bold", it would also be unsupportable. This Court is disposed to follow the pronouncements of the Supreme Court, not predict them. The Supreme Court has said:

> "The law, however, does not make the mere size of a corporation, however impressive, or the existence of an unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. *United States* v. *United States Steel Corp.*, 251 U.S. 417, 451, 64 L. ed. 343, 353, 8 A.L.R. 1121, 40 Sup. Ct. Rep. 293." *United States* v. *International Harvester Co.*, 274 U.S. 693 at page 708, 71 L. ed. 1302 at page 1310, 47 Sup. Ct. 748 (1927).

The Court has found nothing in reported cases which would detract from such a clear pronouncement.[2] The plaintiff in *United States* v. *Manufacturers Hanover Trust Co.*, 240 F.Supp. 867 (NY 1965), also a merger case, urged this same contention, to which the district court responded in the following fashion:

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2. And the method used to achieve bigness through the vehicle of merger was attacked in *United States* v. *International Harvester Co.*, *supra*, without success.

> "Arguments based on size, big or little, appeal not to reason or fairness but to emotion and prejudice. The government's [plaintiff's] cries may stir resonant chimes in some ears, but they strike a gong of alarm in ours. Daily experience in the trial court teaches that such pleas generally mask a meritless case and, if anything, compel an examination of the evidence with special scrutiny and cold objectivity lest our oath of office become a hollow mockery and equal justice for the rich and the poor alike an empty platitude. That is no doubt the premise underlying the rule that absolute size (wealth) standing alone proves nothing violative of the antitrust laws. Were this a jury trial we would be bound to give such an instruction, and surely we can do no less than observe the law ourselves." 240 F. Supp. 867 at page 928.

The cases cited by the court in footnote 165, 240 F. Supp. 867 at page 928 fully support its remarks. The combined size alone of the merged Defendants nor the method used to achieve such size are not enough to authorize summary judgment for Plaintiff.

Plaintiff's allegations of price fixing and division of markets, ordinarily per se violations of the antitrust laws, are unsupported by any factual assertions; they are mere legal conclusions. In addition, they are denied by Defendants and in any event must be considered as issues which if properly developed would contain material facts as to which there is a dispute among the parties. Summary judgment for Plaintiff cannot be predicated on his "bare bones" allegations of price fixing and division of markets and in no event where such allegations are denied by Answer.

The next question is Plaintiff's standing to sue. This is raised by Defendants and their contention that he has

no such standing is urged by them as ground for summary judgment. Plaintiff's substantive right of action, if any, is created by 15 U.S.C.A. §§ 15 and 26, the former statute allowing recovery of treble damages and the latter statute permitting injunctive relief. The issue of standing to sue generally depends on whether a Plaintiff from a causation standpoint has suffered a "direct" rather than an "incidental" injury as a result of some violation of the antitrust laws by a Defendant or whether the business or property of a Plaintiff is in the "target area" of a Defendant's unlawful act. *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (Second Cir. 1970). The latter proposition may be quickly dealt with for without a moment's hesitation it must be concluded that Plaintiff's employment with Defendant Sunray was not within the "target area" of the alleged anticompetitive result of the merger of the Defendants. It is undisputed that Plaintiff's employment was desired after the merger for he was offered three job opportunities all of which he rejected.

In attempting to analyze the great variety of language used by the Courts to describe a "direct" injury, Von Kalinowski concludes that:

> "Whatever these verbal diversities may be, what the courts have done is to formulate a test of *proximate cause, leaving for judicial determination in each case* whether a particular plaintiff should be barred as being only distantly hurt." 2 Von Kalinowski, Antitrust Laws and Trade Regulation § 11.04 [1][e], footnote 43, at page 11-32. (Emphasis supplied.)

Plaintiff contends that his injury is direct, in that the merger eliminated one possible employer from the market for his services. Defendants contend that the proximate and direct cause of Plaintiff's injury, if any, was his own choice not to transfer to another city, for which he was

terminated in that his services were no longer needed in Tulsa, the Plaintiff having no contract of employment for any period of time or for any place. Plaintiff opposes this contention stating that his services were no longer needed in Tulsa because of the merger and thus the merger was the direct and proximate cause of his injury.

Plaintiff's case is not like those involving blacklisting, *Radovich* v. *National Football League,* 352 U.S. 445, 1 L. ed. 2d 456, 77 S. Ct. 390 (1957), nor "no switch" agreements, *Nichols* v. *Spencer International Press, Inc.,* 371 F.2d 332 (Seventh Cir. 1967), nor commission sales agents, *Dailey* v. *Quality School Plan, Inc.,* 380 F.2d 484 (Fifth Cir. 1967). There is no suggestion whatever that Plaintiff has been blacklisted for employment by anyone, including the Defendants nor that there is any agreement between the Defendants or anyone else to not employ each other's employees for a period of time, and Plaintiff does not claim to be a commission sales agent with a competitive territory upon which his earnings depend, even in part. Plaintiff claims only to be a salaried employee.

Recently, in *Wilson* v. *Ringsby Truck Lines, Inc.,* 320 F. Supp. 699 (Colo. 1970), Judge Arraj held that employees who alleged that their earnings were diminished by reason of claimed antitrust violations of their employer could have standing to sue their employer and denied the employer's motion to dismiss. That case may be distinguished from the case at hand in several ways. First, Judge Arraj had before him only the narrow question of the legal sufficiency of plaintiff's action on a motion to dismiss whereas the questions presented here on summary judgment motions require this Court to treat with the legal and factual sufficiency of Plaintiff's case as the same has been developed since it was filed. Each case must stand on its own facts and the facts concerning

Plaintiff's alleged direct injury here are not in dispute and are deemed controlling of the legal result. Next, the matter of "proximate cause" as related to direct injury was not developed in the Colorado case, whereas, it has been fully developed herein.[3] Finally, the Court is of the opinion that Judge Arraj has rejected the teaching of our Circuit in *Nationwide Auto Appraisers Service, Inc.* v. *Association of Casualty and Surety Companies,* 382 F.2d 925 (Tenth Cir. 1967) by reading the direct injury requirement out of the case. Federal statutory law did not supplant the common law but incorporated it. 1 Von Kalinowski, Antitrust Laws and Trade Regulation § 1.02, pp. 1-21 to 1-34. Absent any clear expression on the part of Congress in 15 U.S.C.A. § 15 or our Circuit that the familiar principle of proximate cause should be eliminated from antitrust actions under 15 U.S.C.A. § 15, this Court is not willing to do so. Therefore, assuming, but without deciding, that Plaintiff's employment with Sunray was a property right within the meaning of 15 U.S.C.A. § 15, *Nichols* v. *Spencer International Press, Inc., supra,* the undisputed facts of the termination of his employment do not establish that such termination was the direct and proximate result of the Defendants' merger as a matter of law. Plaintiff himself states he could have continued in employment had he transferred to Dallas. However, he attempted to impose on Sunray the condition that he remain in Tulsa, a right he did not possess by contract or otherwise. Even in the absence of Defendants' merger he could have been required to transfer to another city or he could have been terminated. The Court concludes that his stated desire as to the place of his employment was the proximate cause of his termination of employment as a matter of law.

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3. That "proximate cause" may be a question of law under certain circumstances and thereby make a case ripe for summary disposition see *Haworth* v. *Mosher,* 395 F.2d 566 (Tenth Cir. 1968).

Summary disposition of Plaintiff's standing to sue in this case is in order. In *Nationwide Auto Appraisers, supra,* our Circuit affirmed a summary disposition by this Court of an antitrust claim on the basis that direct injury had not been shown by the pleadings and matters offered in support thereof. Summary proceedings have long been recognized as an appropriate vehicle for disposition of the standing to sue question. *SCM Corporation* v. *Radio Corporation of America,* 407 F.2d 166 (Second Cir. 1968); *Productive Inventions* v. *Trico Products Corp.,* 224 F.2d 678 (Second Cir. 1955). The undisputed facts now before the Court do not reveal a direct and causal connection between the Defendants' merger and the alleged injury to Plaintiff as a matter of law.

Other issues raised by the parties need not be treated within view of the result reached by the Court on the controlling issue of standing to sue.

Defendants' Motion for Summary Judgment is granted and Plaintiff's Motion for Partial Summary Judgment is denied. Counsel for Defendants is requested to prepare an appropriate judgment for entry herein and submit the same to the Court within fifteen (15) days of the date hereof.

It is so ordered this 20 day of May, 1971.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX F

MANS ET AL. v. SUNRAY D-X OIL CO. ET AL.

JUDGMENT

(Filed June 7, 1971)

This cause comes on for disposition upon Plaintiffs' Motion for Partial Summary Judgment and upon Defendants' Motion for Summary Judgment. The Court has considered the depositions, affidavits, pleadings, arguments and all matters of record herein presented to the Court by the parties herein and has determined for the reasons set forth in its Order of May 20, 1971 that Plaintiffs' action should be dismissed.

Wherefore, it is ordered, adjudged and decreed that Plaintiffs' action herein is hereby dismissed and judgment is hereby entered in favor of the Defendants and against the Plaintiffs.

Dated this 4 day of June, 1971.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX G

JOBE ET AL. v. AMERADA ET AL.

COURT OF APPEALS DECISION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Denver, Colorado 80202

Howard K. Phillips
Clerk

Telephone
303-837-3157

February 6, 1973

Stan P. Doyle, Esquire
Attorney at Law
P. O. Box 4470
Tulsa, Oklahoma 74104

Re: No. 72-1341, Del Jeannene Jobe, etc., et al. v. Amerada Petroleum Corporation, et al.

Dear Mr. Doyle:

Enclosed is a copy of the opinion of the Court in the above case. Judgment in accordance with that opinion has been entered today.

Very truly yours,

Howard K. Phillips, Clerk
By: /s/ Lavon M. Irlbeck,
Lavon M. Irlbeck,
Deputy Clerk

li
Enclosure

cc: Richard B. McDermott, Esquire, Attorney at Law, 1300 National Bank of Tulsa Building, Tulsa, Oklahoma 74103

Joseph W. Morris, Esquire, Amerada Hess Corporation, P. O. Box 2040, Tulsa, Oklahoma

William E. Jackson, Esquire, Attorney at Law, 1 Chase Manhattan Plaza, New York, New York

Do not Publish
(See Rule 17)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January, 1973, Term

No. 72-1341

DEL JEANNENE JOBE, individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical Corporation, and the employees and previous employees of Amerada Hess Corporation,
Plaintiffs-Appellants,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL AND CHEMICAL CORPORATION and AMERADA HESS CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(District Court No. 70-C-57)

(Filed February 6, 1973)

Stan P. Doyle, Tulsa, Oklahoma, for Plaintiffs-Appellants.

Richard B. McDermott, Tulsa, Oklahoma (Joseph W. Morris, Tulsa, Oklahoma, and William E. Jackson, New York, New York, on the brief), for Defendants-Appellees.

Before PHILLIPS, HILL and HOLLOWAY, United States Circuit Judges.

PER CURIAM.

Appellant Del Jeannene Jobe, individually and on behalf of employees of several merged companies, appeals from an order granting defendants' motion for summary judgment and dismissing her action in the Northern District of Oklahoma. The dismissal was bottomed on the determination that Jobe lacked standing to sue for loss of employment resulting from an alleged illegal merger.

Appellees Amerada Petroleum Corporation and Hess Oil and Chemical Corporation entered into a merger agreement which received stockholder approval on May 15, 1969. Appellant Jobe was one of Amerada's employees who was terminated on February 2, 1970, as a result of the merger.

Appellant asserts that Section 4 of the Clayton Act protects her right to work by allowing a person injured in her "business or property" to challenge the corporate merger which injures her employment rights. Supporting this conclusion appellant cites Sherman 1 and Clayton 7 and 16. In Reibert v. Richfield Co., et al, ... F.2d ..... (10th Cir. 1973), we determined neither the Clayton Act nor the Sherman Act protects one who loses employment as a result of an alleged illegal merger. Our exhaustive analysis in Reibert clearly indicates employees are not within the area of competition protected by the above stated acts, and we need not elaborate here.

Appellant poses other questions on her appeal pertaining to procedural matters in the trial court. Because of our determination of the standing to sue issue, we need not reach these other questions.

AFFIRMED.

APPENDIX H

JOBE ET AL. v. AMERADA ET AL.

FINDINGS AND RECOMMENDATIONS OF MAGISTRATE

(Filed March 20, 1972)

This matter comes on for hearing on this 11th day of January, 1972, before the undersigned Magistrate, upon motion of the defendants for summary judgment, and for stays of further discovery in the cause. Upon stipulation of counsel the cause was submitted upon briefs previously filed and identified in the memorandum attached to the defendants' motion.

Upon the defendants' motion for summary judgment, the Magistrate finds upon undisputed facts reflected by the pleadings, discovery depositions, and other discovery documents filed in the action:

(1) Each of the appearing plaintiffs, Del Jeannene Jobe, Robert R. McDole and Roy E. Michael, was a salaried employee of the defendant Amerada Petroleum Corporation, who continued briefly in the employ of Amerada Hess Corporation under contract of employment which was terminable at the will of either employer or employee.

(2) Plaintiffs had no other interest or concern in the business of Amerada Petroleum Corporation or of Amerada Hess Corporation than their respective employment for personal services terminable as above found.

(3) Each plaintiff's employment was unrelated to any of the business operations of his employer al-

leged in the Complaint to have been restrained by any violation of the anti-trust laws.

(4) None of the appearing plaintiffs was employed in any activity upon behalf of the defendants or either of them which was within the target area of any restraint alleged in the Complaint.

(5) None of the plaintiffs was injured in business or property by anything forbidden by the anti-trust laws.

(6) Each appearing plaintiff's injury, if any, was indirect, incidental, derivative and remote with respect to any violation of the anti-trust laws, and therefore is not actionable under Section 4 of the Clayton Act (15 U.S.C. 15).

(7) In view of the preceding findings, defendants' motion for summary judgment should be sustained upon the authority of Nationwide Auto Appraiser Service, Inc. v. Association of Casualty and Surety Cos., 382 F.2d 925 (10th Cir. 1967); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (CA-9) cert. den. 342 U.S. 919 (1952); Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183 (CA-2, 1970) cert. den. 401 U. S. 923 (1971); Mans v. Sunray DX Oil Co., No. 70-C-140, USDC-DC-Okla. (May 20, 1971); Contreras v. Grower Shipper Vegetable Assn., 1971 Trade Cases, paragraph 73,592 (ND-Calif. 1971); Bywater, et al v. Matshushita Elec. Ind. Co., Ltd., et al, 1971 Trade Cases, paragraph 73,759, and other cases cited in defendants' briefs.

(8) In view of the finding that the appearing plaintiffs have no standing to sue upon the claims asserted, they have no capacity to represent others who might or might not have claims in the pleaded premises.

In view of the findings and recommendations hereinbefore set forth upon defendants' motion for summary judgment, further discovery and all pending discovery should be stayed pending the other and further order of the court.

The request of the plaintiffs for pre-trial conference in the presence of the court should be overruled.

In view of the findings and recommendations upon the defendants' motion for summary judgment, the plaintiffs' request for determination of a class action should be overruled, and certification of a class should be denied.

IT IS, THEREFORE, RECOMMENDED BY THE MAGISTRATE THAT:

1. The defendants' motion for summary judgment should be sustained, the plaintiffs' cross motion for partial summary judgment should be denied, and judgment of dismissal upon the merits should enter for the defendants.

2. All further and pending discovery in the action should be stayed pending the further order of the court.

3. Plaintiffs' request for pre-trial conference in the presence of the court should be denied.

4. Plaintiffs' motion for determination of a class should be overruled, and certification of a class should be denied.

FILED AND ENTERED this 11th day of January, 1972.

/s/ Morris L. Bradford
Morris L. Bradford, Magistrate

Form Approved:

/s/ Stan P. Doyle
For Plaintiffs

/s/ R. B. McDermott
For Defendants

APPENDIX I

JOBE ET AL. v. AMERADA ET AL.

ORDER

(Filed March 20, 1972)

After reviewing the file and record in this case, the findings and recommendations of the Magistrate are hereby approved, and

IT IS SO ORDERED.

The Clerk of the Court shall forward by mail a copy of this Order to each of the attorneys for the appearing plaintiffs and for the defendants.

Dated this 20 day of March, 1972.

/s/ Allen E. Barrow
United States District Judge

JOBE ET AL. v. AMERADA ET AL.

JUDGMENT

(Filed March 20, 1972)

This action came on for hearing before the Court, Honorable Allen E. Barrow, Chief District Judge, presiding, and the Motion For Summary Judgment made by the defendants having been sustained, and plaintiffs' Cross Motion For Partial Summary Judgment denied, and due entry thereof having been made,

IT IS ORDERED AND ADJUDGED

That the plaintiffs and each of them take nothing upon their Complaint, that this action is dismissed upon the

merits, and that the defendants have and recover of and from the plaintiffs, their costs of action.

Dated at Tulsa, Oklahoma, this 20 day of March, 1972.

/s/ Allen E. Barrow
United States District Judge

Form Approved:

/s/ Stan P. Doyle
For Plaintiffs

/s/ R. B. McDermott
For Defendants

APPENDIX J

STATUTES INVOLVED

SHERMAN ACT

Section 1 (15 U.S.C. Sec. 1)

"Every contract . . . in restraint of trade or commerce . . . is declared to be illegal."

CLAYTON ACT

Section 4 (15 U.S.C. Sec. 15)

Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.

Section 7 (15 U.S.C. Sec. 18)

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 16 (15 U.S.C. Sec. 26)

Injunctive relief for private parties; exception.

Any person, firm corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, Sec. 16, 38 Stat. 737.

INTERSTATE COMMERCE ACT

Section 5 (2) (a)

Unifications, mergers, and acquisitions of control.

It shall be lawful, with the approval and authorization of the Commission as provided in subdivision (b) of this paragraph.

Section 5 (2) (c)

In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5 (2) (f)

As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

Section 5 (b) (9)

Parties to any agreement approved by the Commission under this section and other persons are, if the ap-

proval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

OKLAHOMA STATUTES

10 Okla. Statutes (1971) Sec. 12

Maintenance of poor persons by parents—Promise of adult child to pay for necessaries

It is the duty of the father and the mother of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to a parent is binding.

32 Okla. Statutes (1971) Sec. 3

Duty to support

The husband must support himself and his wife out of the community property or out of his separate property or by his labor. The wife must support the husband when he has not deserted her out of the community property or out of her separate property when he has no community or separate property and he is unable from infirmity to support himself.

Supreme Court, U. S.
FILED
MAR 12 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY
and
SINCLAIR OIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS ATLANTIC RICHFIELD COMPANY AND SINCLAIR OIL CORPORATION IN OPPOSITION TO PETITION

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March 12, 1973

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY
and
SINCLAIR OIL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS ATLANTIC RICHFIELD COMPANY AND SINCLAIR OIL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the court of appeals in *Reibert v. Atlantic Richfield Co.* is reported at 1973 Trade Cas. ¶ 74,298 (10th Cir.). The findings and recommendations of the magistrate

and the district court's order and judgment, all filed on March 20, 1972, are unreported but reproduced as Appendices B and C to the petition.

Counter-Statement of Statutes Involved

The only statutes involved in *Reibert v. Atlantic Richfield Co.*, are Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4, 7 and 16 of the Clayton Act, 15 U.S.C. § § 15, 18 and 26. These statutes are set forth in Appendix J to the petition.

Counter-Statement of Question Presented

The only question presented for review in *Reibert v. Atlantic Richfield Co.* is whether a salaried research technician who claims to have been discharged as a result of the merger between Sinclair Oil Corporation ("Sinclair"), his former employer, and Atlantic Richfield Company ("ARCO") has standing under Sections 4 and 16 of the Clayton Act to complain that the merger had anticompetitive effects prohibited by Section 1 of the Sherman Act or Section 7 of the Clayton Act.

Counter-Statement of the Case

Petitioner Reibert's Statement of the Case is argumentative, and it contains allegations of disputed fact which go beyond the record. The only facts material to consideration of the question presented in *Reibert v. Atlantic Richfield Co.* are, however, undisputed, and a statement of these facts follows.

Reibert was employed by Sinclair from 1952 through March 4, 1969 when Sinclair was merged into ARCO (R. 81).[1] Originally employed as a draftsman, he subse-

1. Reference to "R. " are to the pages of the printed appendix submitted on the appeal to the Tenth Circuit. At petitioner's request this appendix has been certified to this Court in lieu of the original record on appeal.

quently held various other positions and was working as a research technician at the time of the merger (R. 82, 85). He continued in ARCO's employ in the same capacity following the merger. In June 1969, the research project on which Reibert was working was discontinued, and as a consequence, his employment was terminated in the winnowing of personnel which accompanied the post-merger reorganization of the combined research staffs (R. 20, 34; see R. 52, 89).

During the entire period of his employment with Sinclair and ARCO, Reibert's sole compensation was his salary which at the time of his termination was $870 per month (R. 20, 82). At no time was he paid commissions (R. 82). His employment was at all times terminable at will (R. 81, 143), and he had no interest or concern in the business of Sinclair or ARCO other than his employment for personal services (R. 143).

Reibert claims that the ARCO-Sinclair merger violated Section 1 of the Sherman Act ("Section 1") and Section 7 of the Clayton Act ("Section 7") in that allegedly it is in restraint of trade and its effect may be substantially to lessen competition, or to tend to create a monopoly, in the "petroleum (production and sales) line of commerce" (R. 19). He contends that he has standing under Sections 4 and 16 of the Clayton Act to challenge the merger by reason of the alleged injury he suffered when his employment was terminated (R. 20, 34).

On defendants' motion for summary judgment, the district court dismissed the complaint holding that Reibert lacked standing under Sections 4 and 16 of the Clayton Act to complain of alleged anticompetitive effects of the merger in the petroleum (production and sales) line of commerce (A. 16-20).[2] The Tenth Circuit affirmed.

2. References to "A. " are to the pages of the appendix to the petition.

REASONS FOR DENYING THE PETITION

The present case involves nothing more than the application of well-established rules of antitrust standing to a common factual situation. In affirming the district court's decision in the present case, the Tenth Circuit correctly followed numerous precedents stretching back sixty years. Its holding is not in conflict with holdings of this Court or any circuit, and this case presents no important question of federal law for resolution by this Court.

I.

THE TENTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH HOLDINGS OF THIS COURT OR ANY CIRCUIT.

A. The Well-Established Standing Rule

It has long been recognized that Sections 4 and 16 of the Clayton Act, which govern the right of private litigants to seek redress for violations of Section 1 and Section 7, do not grant standing to all those who may be affected by such violations. Standing is limited by the proximate cause rule embodied in the words "by reason of" in Section 4[3] and the word "by" in Section 16.[4] This proximate cause rule has two requirements. First, it requires a plaintiff to demonstrate that the anticompetitive effects of the alleged violation caused an injury to his competitive business position. Second, it requires a plaintiff to demon-

3. Section 4 provides in pertinent part as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *."

4. Section 16 provides in pertinent part as follows: "Any person * * * shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *."

strate that he was in the particular area of the competitive economy which Congress sought to protect by prohibiting such violations and, hence, that he suffered the direct impact of the anticompetitive effects.

This proximate cause limitation upon standing in private antitrust cases is universally accepted. The courts in all circuits recognize it and regularly apply it in varying factual settings.

First Circuit:

E.g., Robinson v. Stanley Home Prods., Inc., 178 F. Supp. 230, 233-34 (D. Mass.), *aff'd*, 272 F.2d 601 (1st Cir. 1959); *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299, 302-03 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U. S. 828 (1957); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956); *Corey v. Boston Ice Co.*, 207 F. 465, 466 (D. Mass. 1913).

Second Circuit:

E.g., GAF Corp. v. Circle Floor Co., 463 F.2d 753 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3410 (U.S. Jan. 12, 1973) (No. 72-984); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972); *Fields Prods., Inc. v. United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U. S. 949 (1971); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971); *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166, 170-71 (2d Cir.), *cert. denied*, 395 U. S. 943 (1969); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 113 F.2d 114 (2d Cir. 1940), *aff'g* 30 F. Supp. 389, 391 (S.D.N.Y. 1939).

Third Circuit:

E.g., Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Ash v. International Business Machs., Inc.*, 353 F.2d 491, 493-94 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966); *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 315-17 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 706, 709-10 (3d Cir. 1910).

Fourth Circuit:

E.g., South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 419 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

Fifth Circuit:

E.g., Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487-88 (5th Cir. 1967); *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957); *Peter v. Western Newspaper Union*, 200 F.2d 867, 872-73 (5th Cir. 1953); *Coast v. Hunt Oil Co.*, 195 F.2d 870, 872 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952); *Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 338 (E.D. La.), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963).

Sixth Circuit:

E.g., Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

Seventh Circuit:

E.g., Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564, 566-67 (7th Cir.), *cert. denied sub nom. Illinois v. Commonwealth Edison Co.*, 375 U.S. 834 (1963).

Eighth Circuit:

E.g., Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679, 688-89 (8th Cir. 1966); *Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962).

Ninth Circuit:

E.g., Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 10 (9th Cir. 1963); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158, 167 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950); *Contreras v. Grower Shipper Vegetable Ass'n of Central Calif.*, 1971 Trade Cas. ¶ 73,592 (N.D. Cal.); *Sargent v. National Broadcasting Co.*, 136 F. Supp. 560, 566 (N.D. Cal. 1955).

Tenth Circuit:

E.g., Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos., 382 F.2d 925 (10th Cir. 1967).

That this universally accepted limitation on standing precludes suit by a salaried employee based upon antitrust violations aimed at competition in his employer's market is firmly established by overwhelming authority. No fewer than 24 decisions, including holdings by the Second, Third, Fifth and Ninth Circuits, are in accord with this application of the standing limitation.

Holdings:

Centanni v. T. Smith & Son, Inc., 216 F.Supp. 330, 338 (E.D. La.), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963); *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957); *Conference of Studio*

Unions v. Loew's Inc., 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158, 167 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 113 F.2d 114 (2d Cir. 1940), *aff'g* 30 F.Supp. 389, 391 (S.D.N.Y. 1939); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 706, 709-10 (3d Cir. 1910); *J. O. Pollack Co. v. L. G. Balfour Co.*, 1973 Trade Cas. ¶ 74,339 at p. 93, 592 (N.D. Ill. 1972); *Deaktor v. Fox Grocery Co.*, 332 F.Supp. 536, 540-41 (W.D. Pa. 1971); *Bywater v. Matshushita Elec. Indus. Co.*, 1971 Trade Cas. ¶ 73,759 (S.D.N.Y.); *Contreras v. Grower Shipper Vegetable Ass'n of Central Calif.*, 1971 Trade Cas. ¶ 73,592 (N.D. Cal.); *Sargent v. National Broadcasting Co.*, 136 F.Supp. 560, 566 (N.D. Cal. 1955); *Walder v. Paramount Publix Corp.*, 132 F.Supp. 912, 916 (S.D.N.Y. 1955); *Gerli v. Silk Ass'n of America*, 36 F.2d 959, 960-61 (S.D.N.Y. 1929); *Corey v. Boston Ice Co.*, 207 F. 465, 466 (D. Mass. 1913).

Dicta:

Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 487-88 (5th Cir. 1967); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955); *Waldron v. British Petroleum Co.*, 231 F.Supp. 72, 84-85 (S.D.N.Y. 1964); *Schwartz v. Broadcast Music, Inc.*, 180 F.Supp. 322, 327-28 (S.D.N.Y. 1959); *Robinson v. Stanley Home Prods., Inc.*, 178 F.Supp. 230, 233 (D. Mass.), *aff'd*, 272 F.2d 601

(1st Cir. 1959); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F.Supp. 907, 909 (D. Mass. 1956); *Harrison v. Paramount Pictures, Inc.*, 115 F.Supp. 312, 317 (E.D. Pa. 1953), *aff'd per curiam*, 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U.S. 828 (1954).

B. Application of the Standing Rule to the Present Case

In the present case the Tenth Circuit held that Reibert failed to meet either of the two requirements of the proximate cause limitation on standing (*See* p. 5, *supra*).[5] This holding is manifestly correct. There is no causal relationship between Reibert's alleged injury and the alleged anticompetitive effects of the merger in the petroleum industry. Moreover, Reibert was not in the area of the competitive economy protected against the violation he alleges.

(1) Causal Relationship

It is not sufficient for a plaintiff challenging a merger under the antitrust laws to establish that he was injured as a result of an event which would not have occurred in the absence of the merger. He must show that his competitive business position was injured by the alleged anticompetitive effects. *E.g., GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 758-59 (2d Cir. 1792), *petition for cert. filed*, 41 U.S.L.W. 3410 (U.S. Jan. 12, 1973) (No. 72-984); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51, 54 (9th Cir. 1951),

5. In his statement of the case, Reibert states that the Tenth Circuit also concluded "that employment was not 'business or property' as these terms are used in Section 4 * * *." (Petition p. 9.) The Tenth Circuit, however, did not reach this issue. Instead it held that "In no way could his [Reibert's] job be construed as a venture or enterprise within the market area endangered by the merger." (A. 8). See discussion at pp. 10-11, *infra*.

cert. denied, 342 U.S. 919 (1952); *Peterson v. Borden Co.,* 50 F.2d 644, 646 (7th Cir. 1931); *Stokes Equip. Co. v. Otis Elevator Co.,* 1972 Trade Cas. ¶ 73,913 (E.D. Pa.); *Rayco Mfg. Co. v. Dunn,* 234 F.Supp. 593, 597 (N.D. Ill. 1964). Thus, in the *GAF Corp.* case, the Second Circuit summarized the principle underlying numerous decisions which have denied standing where this causal nexus was absent. It stated:

> "• • • The general proposition underlying cases such as these is that only a person whose competitive business position was harmed by the *anticompetitive* effects of the alleged restraint of trade can maintain a treble damage action." (463 F.2d at 758-59. (Emphasis in original.))

Reibert contends that the ARCO-Sinclair merger was illegal because it lessened competition in the competitive market (petroleum production and sales) in which the merger partners operated (R. 19). He also contends that he was injured by *the merger* because the decision to terminate his employment would not have been made in the absence of the merger (*See* Petition pp. 7-8, 17-18). Clearly, this alleged injury is not the result of any anticompetitive effect, but rather what the Tenth Circuit called "the natural effect flowing from the two similarly structured businesses combining to maximize efficiency." (A. 11.) The "injury" would have occurred whether or not the merger violated the antitrust laws, and the required nexus between the anticompetitive effect and the injury is lacking.

(2) Protected Area of Economy

But even assuming *arguendo* that Reibert could demonstrate a causal relationship between anticompetitive effect and injury, he nevertheless lacks standing because he was not within the area of the competitive economy protected against the violation he alleged.

Congress enacted Section 1 and Section 7 to protect commercial competition in the marketing of goods and services.

E.g., Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); *Northern Pac. Ry. v. United States,* 356 U.S. 1, 4-5 (1950); *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 492-93 & n.15 (1940). Reibert argues that this protection of competition was intended to produce incidental beneficial effects in other areas, such as the promotion of full employment (*See* Petition pp. 18-24). But whatever its incidental purposes might have been, Congress focused its scheme of protection on redressing anticompetitive effects in the market place. And, consistent with this focus, the courts have long confined the protection of these laws to the participants in the market which is the target area of the prohibited conduct. *E.g., Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.,* 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.,* 431 F.2d 183, 187 (2d Cir. (1970), *cert. denied,* 401 U.S. 923 (1971); *Conference of Studio Unions v. Loew's Inc.,* 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952).

In the *Conference of Studio Unions* case, for example, the court held that employees lacked standing to complain that their employers were engaged in a conspiracy to restrain trade in the production of motion pictures because the employees were not "within that area of the economy which is endangered by a breakdown of competitive conditions" in the motion picture production industry. 193 F.2d at 54-55. Similarly, the antitrust violation alleged by Reibert would have its direct anticompetitive impact in the petroleum market, and Reibert is not a participant in that market. Any injury he suffers as a result of that impact must necessarily be indirect, through some relationship with a participant in that market. The Tenth Circuit correctly determined that such an injury would be outside the scope of the protection afforded by the antitrust laws.

C. The Asserted Conflicts

Reibert asserts in his petition that the Tenth Circuit's holding in the present case conflicts with holdings of other circuits and of this Court. This assertion is entirely without foundation.

Contrary to Reibert's suggestion (Petition p. 14), the Tenth Circuit's holding in no way conflicts with this Court's decision in *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251 (1972). The only holding in *Hawaii* was that a state could not maintain an action under Section 4 as *parens patriae* to recover damages for injury to its economy. *Id.* at 252-53. And, far from extending antitrust standing to all those who can trace an injury to a violation, this Court recognized that its decision denied Hawaii redress for a remote injury caused by an antitrust violation, *see id.* at 264, and justified this result by reference to the same long standing authorities which required the dismissal of Reibert's complaint. This Court stated:

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. [Citing one case from each circuit]"[6] (*Id.* at 263 n. 14)

Clearly, *Hawaii* does not conflict with the decision below.

Nor is there any merit to Reibert's suggestion (Petition p. 15) that *Radovich v. National Football League*, 352 U. S. 445 (1957), and *Flood v. Kuhn*, 407 U. S. 258 (1972), present a conflict. These were not standing cases, but rather involved the question whether the antitrust laws applied to professional sports. Moreover, unlike Reibert, the plaintiffs in these cases were not persons who suffered

6. The cases cited in support of this statement are included among those cited at pp. 5-7, *supra*.

ncidental remote injuries. They were the very targets of he violations alleged.

Equally without substance is Reibert's rejection (Petiion pp. 15-16) of the clear distinction between salaried mployees and individual entrepreneurs in order to conrive a conflict with *Perkins v. Standard Oil Co. of Calif.*, 95 U. S. 642 (1969); *Dailey v. Quality School Plan, Inc.*, 80 F.2d 484 (5th Cir. 1967); *Nichols v. Spencer Int'l 'ress, Inc.*, 371 F.2d 332 (7th Cir. 1967); *Roseland v. hister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942).

Perkins involved an individual entrepreneur who operted in the threatened market both directly and through holly-owned corporate shells. As this Court stated,

> "• • • Perkins was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard. • • • [H]e was *directly* injured • • •." (395 U. S. at 649-50 (Emphasis added.) *See also GAF Corp. v. Circle Floor Co.*, 463 F.2d 753, 758 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3410 (U. S. Jan. 12, 1973) (No. 72-984).)

he plaintiffs in the other cases were commission sales ents who had developed their own territories and were, effect, joint venturers in the competitive market with e companies whose products they sold. Their situation far different from that of Reibert, a salaried research hnician, who was in no sense a participant in the threated market. Unlike the plaintiffs in these cases, Reibert l not suffer the direct impact of the anticompetitive fects he has alleged.

The petition fails, therefore, to demonstrate any conct between the Tenth Circuit's holding in the present se and any holding of any other circuit or of this Court.

II.

THE TENTH CIRCUIT'S HOLDING PRESENTS NO IMPORTANT QUESTION OF ANTITRUST LAW

The present case presents no important question of federal law for resolution by this Court. As demonstrated above, the Tenth Circuit's holding is a routine application of the well-established antitrust standing rule. There is no more reason to review this application of the rule than the eighteen previous applications where the unsuccessful party sought review by this Court. In 15 of these cases, standing had been denied. In all of them certiorari was denied.

> *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971); *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U. S. 923 (1971); *Fields Prods., Inc. v. United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U. S. 949 (1971); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971); *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U. S. 943 (1969); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966); *Ash v. International Business Machs., Inc.*, 353 F.2d 491 (3d Cir. 1965), *cert. denied*, 384 U. S. 927 (1966); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U. S. 880 (1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied sub nom. Illinois v. Commonwealth Edison Co.*, 375 U. S.

834 (1963); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U. S. 907 (1963); *Miley v. John Hancock Mut. Life Ins. Co.*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U. S. 828 (1957); *Melrose Realty Co. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir.), *cert. denied*, 352 U. S. 890 (1956); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956); *Harrison v. Paramount Pictures, Inc.* 211 F.2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954); *Coast v. Hunt Oil Co.*, 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U. S. 836 (1952); *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U. S. 919 (1952); *Schatte v. International Alliance of Theatrical Stage Employees*, 182 F.2d 158 (9th Cir.), *cert. denied*, 340 U. S. 827 (1950).

The rule applied in the present case and its many predecessors does not frustrate vigorous antitrust enforcement. Rather, it prevents the flood of private antitrust suits which would otherwise engulf the federal courts, removes the concomitant risk of multiple recoveries for the same injury, and brings a vital element of precision to antitrust law. As the Second Circuit stated:

> "A line which limits standing to those against whom the antitrust violation is directed fulfills Congress' fundamental purpose and at the same time establishes a reasonable and easily identifiable cut-off that avoids the unfortunate consequences of opening the flood-gate to all, no matter how remote their interest or incidental their relationship. Competitors who are within the target area of an alleged antitrust conspiracy usually have more incentive than others to avail themselves of § 4. In those cases where they fail to do so, the Government may, of course, seek injunctive or punitive relief under other sections of

> the antitrust laws. See, e.g., 15 U.S.C.§§ 1, 2, 4, 9." (*Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). (Footnote omitted.))

Moreover, in view of the fact that for more than sixty years this rule has been consistently applied to preclude suit by those remotely or incidentally injured by antitrust violations, it must be regarded as having the tacit approval of Congress. *E.g., Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925, 929 (10th Cir. 1967); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F.Supp. 907, 909 (D. Mass. 1956). Any departure from this rule would, therefore, be a matter for legislative rather than judicial initiative. *See, e.g., Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972); *id.* at 286 (Burger, C. J., concurring).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1134

DEL JEANNENE JOBE, individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical Corporation, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 14, 1973

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1134

DEL JEANNENE JOBE, *et al.*,
Petitioners,

v.

AMERADA PETROLEUM CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Whether petitioners, former salaried employees of one of two merging corporations whose employment was terminable at will and was in fact terminated following the merger, have standing to sue for damages allegedly resulting from such termination, based on a claim that the merger violated the antitrust laws?

Counter-Statement of the Case

In this action, commenced February 24, 1970, petitioners—three former salaried employees of the Amerada Division of respondent Amerada Hess Corporation—individually and on behalf of a purported class of former

employees sought treble damages and divestiture under Sections 4 and 16 of the Clayton Act based on the claim that the termination of their employment on February 2, 1970, resulted from the merger, alleged to be in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act, of Hess Oil & Chemical Corporation ("Hess") into Amerada Petroleum Corporation ("Amerada") on June 20, 1969.

At the time of the merger of Hess into Amerada, petitioners were employed as draftsmen in the geophysical department of Amerada in Tulsa (which after the merger became the Amerada Division of respondent Amerada Hess Corporation). None of them had a contract of employment; all were salaried employees terminable at will. (R Vol. I, pp. 21, 30, 41 and 161)*

Contrary to plaintiff's statement [Petitioners' Brief ("Pet. Br.") pp. 11-12], prior to the merger Hess was not an integrated oil company, but was engaged almost exclusively in refining crude oil purchased from others and in marketing refined oil products. In contrast, prior to the merger, the activities of Amerada were limited almost exclusively to exploration for, and production of, crude oil. (R Vol. VI, p. 89; Vol. VII, pp. 64-65)

The record clearly shows that prior to the merger no consideration was given to its possible effect on the employees of either company, nor was it contemplated that the merger would result in the termination of any employees. The organizational review of the Amerada Division, which led to the terminations, early retirements and transfers of certain of the Division's personnel, including petitioners, was not even undertaken until late October 1969, some five months after the merger had been approved by the stockholders of Hess and Amerada, and some four months after the closing of the merger. This review, which was completed in November 1969, related exclusively to the Amerada

* References to "R.." are to the pages of the original record on appeal.

Division and was primarily designed to improve the efficiency of the internal operation of the Division. In the course of the review, it was discovered that there were a considerable number of redundant employees in the Amerada Division, a discovery which led to the recommendation, in early 1970, that certain of the Division's employees be terminated, retired early, or transferred. (R Vol. VI, p. 81; Vol. VII, pp. 11, 24-26; and Vol. VIII, pp. 37-38, 46)

Petitioners' employment was terminated on February 2, 1970, and this suit was instituted that same month.

Petitioners erroneously imply that the motion for summary judgment was granted " . . . on the ground that claimed loss of employment does not constitute injury to business or property." (Pet. Br. pp. 12-13) As the Court of Appeals noted, the District Court's dismissal "was bottomed on the determination that Jobe lacked standing to sue for loss of employment resulting from an alleged illegal merger." (A 35)* In affirming the Court held:

> "Our exhaustive analysis in Reibert[**] clearly indicates employees are not within the area of competition protected by the above-stated acts, and we need not elaborate." (A 35)

Reasons for Denying Certiorari

This case involved nothing more than the application of well-settled rules to a particular set of facts. It was correctly decided in the Courts below.

There is no departure from the decisions of this Court nor any conflict among the Courts of Appeals on the legal issue involved, and this case presents no novel or important federal question for this Court to review.

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*References to "A ....." are to the pages of the appendix to the petition.

** See decision in *Reibert* v. *Atlantic Richfield Co.*, et al., reprinted at A 3-A 14.

ARGUMENT

Under Well-Settled Rules Petitioners Have No Standing to Claim any Relief Under the Antitrust Laws.

A. The Uniform Rule on Standing

For nearly sixty-five years, the federal courts have uniformly held that the right of private parties to sue under the antitrust laws is limited to persons who are engaged in the business in which the alleged antitrust violations have restrained competition and who are "directly" injured by such allegedly illegal restraints because of the lessening of competition occasioned thereby.* It is not enough that the ultimate effects of the activity, filtered through many layers of the economy, allegedly cause some loss. A claimant must show that his claimed injuries were not incidental and indirect but rather that he was possessed of business or property in the line of commerce in which competition is allegedly restrained, and injured by reason of the alleged restraint on competition within that line of commerce.

The "directness" requirement has long been recognized and applied in many cases in all circuits. For example:

First Circuit:

> "The injuries set forth thus seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U.S.C.A. § 15." *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957). See also *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

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*Limitations upon private standing to sue were recognized under Section 7 of the Sherman Act (Act of July 2, 1890, Ch. 647, § 7, 26 Stat. 210.), the predecessor of Section 4 of the Clayton Act. *Ames* v. *A.T.&T.*, 166 Fed. 820 (C.C.D. Mass. 1909). Section 4 is substantially identical to that former statutory provision, and the cases decided under Section 7 of the Sherman Act are valid authority on that issue.

Second Circuit:

"Those harmed only incidentally by antitrust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover." *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied,* 350 U.S. 936 (1956). *Accord, SCM Corp.* v. *Radio Corp. of America,* 407 F.2d 166, 170-71 (2d Cir.), *cert. denied,* 395 U.S. 943 (1969).

Third Circuit:

"[T]he courts recognize that the Act does not give a right of action to every one who can trace a financial loss, however remote, to a violation of the antitrust laws." *Harrison* v. *Paramount Pictures, Inc.,* 115 F. Supp. 312, 317 (E.D. Pa. 1953), *aff'd,* 211 F.2d 405 (3d Cir.), *cert. denied,* 348 U.S. 828 (1954). *Accord, Melrose Realty Co.* v. *Loew's, Inc.,* 234 F.2d 518 (3d Cir.), *cert. denied,* 352 U.S. 890 (1956).

Fourth Circuit:

"If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." *South Carolina Council of Milk Producers, Inc.* v. *Newton,* 360 F.2d 414, 419 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966).

Sixth Circuit:

"It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the antitrust laws directed against the supplier's customer." *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied,* 372 U.S. 907 (1963).

Ninth Circuit:

> "[T]he rule is that one who is only *incidentally* injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955). *Accord, Hoopes* v. *Union Oil Co.*, 374 F.2d 480, 485 (9th Cir. 1967).

Tenth Circuit:

> "[W]e hold that under the authorities the plaintiff here has not alleged a cause of action under the Clayton Act because its position relative to the injuries resulting from the alleged acts of the defendants is too remote.
>
> ". . . [I]ts damage resulting from the acts of defendants would come about 'indirectly,' 'remotely,' or as 'derivative damages.'" *Nationwide Auto Appraiser Service, Inc.* v. *Assoc. of Casualty and Surety Cos.*, 382 F.2d 925, 928-29 (10th Cir. 1967).

See also, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F.2d 564, 566-67 (7th Cir.), *cert. denied, sub nom., Illinois* v. *Commonwealth Edison Co.*, 375 U.S. 834 (1963); *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484, 487-88 (5th Cir. 1967); *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 688-89 (8th Cir. 1966).

Standing is accorded only to those directly injured by an antitrust violation and is denied to those whose injury is indirect, secondary, derivative or remote. Unless a potential plaintiff can demonstrate he is within what is termed the "target area" of the violation, he has no standing to sue. *E.g., Fields Productions, Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971);

Billy Baxter, Inc. v. *Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679-80 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Nationwide Auto Appraiser Service, Inc.* v. *Assoc. of Casualty and Surety Cos.*, 382 F.2d 925, 927-29 (10th Cir. 1967); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955); *Kirihara* v. *Bendix Corp.*, 306 F. Supp. 72, 89-91 (D. Hawaii 1969).

The "target area" concept, referred to above, is a judicial construction to ensure that the:

> ". . . broad language [of] § 4 of the Clayton Act does not give a private cause of action to a person whose losses result only from an interruption or diminution of profitable relationships with the party directly affected by alleged violations." *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956) (Wyzanski, J.)

The term "target area" is used to denominate "that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

In order to demonstrate standing, a plaintiff must show that the claimed injury suffered is causally connected to the violation alleged. The Courts have construed this to require a demonstration of proximate causality and a showing that there is a connection between the loss of competition and the harm allegedly incurred.

> ". . . this [causal] connection must . . . link a specific form of illegal act to a plantiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect." *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d at 187.

This Court has repeatedly denied certiorari in cases involving the directness or "target area" requirement. *E.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d 51, 54 (9th Cir.), *cert. denied*, 342 U.S. 919 (1952).

B. Application of the Standing Rule to This Case

Here it is clear that petitioners are not within the "target area". The prohibition in Section 7 of the Clayton Act of mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" was not designed to protect employment, but rather to prevent the destruction of competition in the industry of which the merging companies are a part. Petitioners' activities are not in the area of the economy allegedly threatened by a restraint on competition, their alleged injury is not a direct result of lessened competition in that line of commerce and, thus, their alleged injury is merely incidental.

The decisions below were thus consistent with the doctrine of standing as uniformly applied by the federal courts.

In *Conference of Studio Unions* v. *Loew's Inc., supra*, a case nearly on "all fours" with this one, the "target area" concept was applied to a claim raised by employees. There, the plaintiff union members who had been discharged by certain major motion picture producers, allegedly as a result of a conspiracy to injure certain independent studios and monopolize the movie production business, brought suit under Section 4. The Court of Appeals for the Ninth

Circuit, in affirming a judgment on the pleadings predicated upon the holding that the plaintiffs lacked standing, observed:

> "Any restraint on commercial competition would occur in the production of motion pictures and we fail to see how appellants [the employees] are in a position to complain about that situation."
>
> • • •
>
> "The damage alleged to have been suffered by appellants [loss of employment] does not flow from any injury to the competitive situation in the motion picture industry . . ." 193 F.2d at 54

This reasoning is wholly applicable to the present case. To paraphrase: any restraint on commercial competition as a result of the allegedly unlawful merger here would occur in the production, refining and marketing of petroleum products, and the damage alleged, loss of employment, does not flow from any injury to the competitive situation in the petroleum industry.

Moreover, it is clear that affording a remedy for this alleged injury does not aid in the effectuation of the purposes of Section 7, to wit: the inhibition of unlawful diminutions of competition in industries by way of mergers. In short, the "target area" of this alleged violation is the petroleum industry, in which plaintiffs have no direct interest. Their alleged injury was at most an indirect and unforeseen consequence of the merger and did not flow from any breakdown of competitive conditions in that industry and, as such, it is incidental, secondary, derivative and remote.

C. Petitioners' Efforts to Avoid the Standing Requirement

Petitioners' contention that salaried employees may sue under Section 4 of the Clayton Act for the kind of injury allegedly suffered here is completely unsupported by the cases cited.

For instance, *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251 (1972), (Pet. Br. p. 14), involved the issue of a state's standing to sue under Section 4 of the Clayton Act on behalf of its citizens for injury to the general economy by means of the doctrine of *parens patriae;* the question of the directness of injury was not before the Court.

Petitioners' reliance on *Radovich* v. *National Football League*, 352 U.S. 445 (1957) and *Flood* v. *Kuhn*, 407 U.S. 258 (1972) is also misplaced. The issue of standing was not raised in those cases. In both *Radovich* and *Flood*, the plaintiffs were engaged in the lines of commerce restrained and thus were the very targets of the violations.

In *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969) the plaintiff was not a salaried employee but ". . . one of the largest independent distributors of gasoline and oil in both Washington and Oregon." 395 U.S. at 644. There, Perkins brought an action under the Robinson-Patman Act alleging price discrimination by his supplier. Perkins' standing under that Statute was challenged on the grounds that the price discrimination was filtered through other distributors before it reached the competitive line in which injury was claimed. This Court resolved that issue by application of the indirect purchaser doctrine, unique to the Robinson-Patman Act. In any event, Perkins was engaged in the sale of gasoline, the product which defendant sold at prices claimed to be discriminatory. Hence, his injury did not involve the issue of directness here presented; Perkins was "aimed at" and within the "target area" of the violation.

The same is true of *Vandervelde* v. *Put and Call Brokers & Dealers Ass'n*, 344 F. Supp. 118 (S.D.N.Y. 1972). The plaintiff in that case was not merely a salaried employee but was in fact the sole proprietor of a put and call business which was found to have been injured by reason of a boycott. The defendant in *Vandervelde* was an association of indi-

vidual put and call brokers. The plaintiff was a member of the association who had been suspended for his refusal to adhere to a rule of the association found to be violative of the antitrust laws. The directness of the plaintiff's injury is thus apparent; the plaintiff (and his *alter ego*, the wholly-owned corporation through which he did business) was the target of the violation alleged. The plaintiff was engaged in the line of commerce restrained by the association's illegal rule and directly injured by the association's enforcement of that rule; he was not only in the target area—he was the target.

Not only do petitioners misread the authorities, but they also err in contending that the "directness" required to establish standing is a showing that their injury was a direct result of *the merger*. This is a misconception. In order to have standing, a plaintiff must demonstrate that the alleged injury was a direct and intended result of the *illegality* of the merger. See cases cited at pp. 4-7, *supra*. The lessening of competition must be the "but for" and proximate cause of the injury. In short, unless the injury is causally connected to the violation—*i.e.*, results from the 'lessening of competition'—and is the first and direct impact of the allegedly tortious course of conduct, a plaintiff has no standing to sue.

The question posed by this case is not whether the national pro-competitive policy embodied in the antitrust laws is one of highest dignity or whether the Congress has invested individuals with the power of private attorneys general, but rather what is the limit of that grant of authority. Sociological tracts as to the importance of a free market economy or the value of the "work ethic" are simply beside the point.

CONCLUSION

There are no special or important reasons for this Court to review the decision below, and therefore the petition should be denied.

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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1134.

KEN F. MANS, Individually and on Behalf of All Persons Employed by Sunray DX Oil Company and Sun Oil Company as of the Date of Merger of These Two Companies,
Petitioners,

v.

SUNRAY DX OIL COMPANY and SUN OIL COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF FOR RESPONDENTS SUNRAY DX OIL COMPANY AND SUN OIL COMPANY IN OPPOSITION TO PETITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1972.

No. 72-1134.

KEN F. MANS, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS EMPLOYED BY SUNRAY DX OIL COMPANY AND SUN OIL COMPANY AS OF THE DATE OF MERGER OF THESE TWO COMPANIES,

Petitioners,

v.

SUNRAY DX OIL COMPANY AND SUN OIL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS SUNRAY DX OIL COMPANY AND SUN OIL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is submitted on behalf of Sun Oil Company and Sunray DX Oil Company, respondents in *Mans v. Sunray DX Oil Company, et al.*, in opposition to the issuance of the writ of certiorari sought by petitioner Mans in that action.

OPINIONS BELOW.

The opinion of the court of appeals in *Mans v. Sunray DX Oil Company, et al.*, filed January 17, 1973, is unreported and is reprinted in Appendix D to the Petition. The order and judgment of the district court, filed respectively on May 20, 1971, and June 7, 1971, are unreported and are reproduced as Appendices E and F to the Petition.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1). The judgment sought to be reviewed in *Mans v. Sunray DX Oil Company, et al.*, was entered January 17, 1972.

QUESTION PRESENTED.

Were the lower courts correct in determining that a salaried employee, who quit his job rather than accept a transfer which he claims was caused by a merger involving his employer, does not have standing to sue under Sections 4 and 16 of the Clayton Act to assert a claim that the merger violated Section 7 of the Clayton Act and Section 1 of the Sherman Act.

STATUTES INVOLVED.

The only statutes involved in *Mans v. Sunray DX Oil Company, et al.*, are Section 1 of the Sherman Act, 15 U. S. C. § 1, and Sections 4, 7, and 16 of the Clayton Act, 15 U. S. C. §§ 15, 18 and 26. These statutes are set forth in Appendix J to the Petition.

STATEMENT OF THE CASE.

Jurisdiction of the district court was invoked under Sections 4 and 16 of the Clayton Act, 15 U. S. C. Sections 15 and 26. The complaint alleges that the merger of Sun Oil Company ("Sun") and Sunray DX Oil Company ("Sunray"), which became effective on October 25, 1968, was illegal under Section 1 of the Sherman Act (15 U. S. C. Section 1) and Section 7 of the Clayton Act (15 U. S. C. Section 18).

In his complaint, plaintiff claims to represent not only his own interest but those as well of a class said to consist of "persons similiarly situated who were employees of the Sunray DX Oil Company before that corporation was merged into the Sun Oil Company . . . [and] those persons who were employees of Sun Oil Company as of the date of the merger of these two corporations . . ." (R. Vol. I, p. 3). The complaint seeks sixty million dollars in money damages (twenty million dollars trebled) and, as additional equitable relief, the divestiture of Sunray (no longer extant) by Sun (Id., p. 17). Sun's answer to the complaint denied the material averments which purported to form the basis for plaintiff's claim of illegality with respect to the merger, and also raised affirmative defenses including plaintiff's lack of standing to sue (Id., p. 101-106).

On September 29, 1970, after the pleadings were closed, Sun's counsel took the deposition of plaintiff, the transcript of which appears in the record in the Court of Appeals as Volume II. The undisputed facts established by that deposition and the pleadings are as follows: Plaintiff was a salaried employee of Sunray compensated by salary alone and not by commissions or bonuses (R. Vol. II, pp. 33-34). He was initially employed by a corporate predecessor of Sunray at its Madison, Wisconsin, office as a lubrication engineer (Id., pp. 12-13). Shortly

thereafter, he moved to Tulsa and was based there for seventeen years with responsibilities in bulk lube oil sales. Plaintiff's salary and responsibility increased from time to time and by the date of the merger he was manager of compounder-blender sales (Id., pp. 14-27, 30-32). His duties throughout the period involved "a lot" of traveling, including in the latter years calling on customers throughout the mid-continent area (Id., pp. 27-28).

More than a year after the merger, Sun proposed a reorganization of the department of which plaintiff was a member. This reorganization was first explained to plaintiff by his superior, Anderson, the Manager of the Wholesale Department, in the Spring of 1970 (Id., pp. 43-44). Anderson indicated that he wanted plaintiff to become an Area Manager of the Department operating out of either Dallas or Houston (Id., pp. 52-56). Anderson told plaintiff that this was one of the most important asasignments in the Department and he wanted one of the best men to fill it (Id., p. 56). Moreover, Anderson offered to raise plaintiff's salary by 100 dollars per month immediately, rather than waiting for his anniversary date (Id., pp. 56-57). When plaintiff subsequently informed Anderson that he was not interested in going to Dallas, Anderson offered him comparable jobs in either Atlanta or Minneapolis, but plaintiff turned these down as well (Id., pp. 65, 92).

His employment terminated in April, 1970, when he elected not to accept one of the three new positions offered to him at higher salaries. (Id., pp. 52-57, 65, 92). The suit followed immediately on April 30, 1970.

Sun moved for summary judgment on the ground that the undisputed facts testified to by plaintiff demonstrated that plaintiff lacked standing to maintain the action (R. Vol. I, pp. 111-112). Plaintiff responded with two brief affidavits: One, his own setting forth certain of his subjec-

tive beliefs or feelings was apparently intended to correct impressions he feared had been left by his deposition (Id., pp. 115-116); and one by his counsel which was purely argumentative, not a recitation of facts (Id., pp. 113-114). Meanwhile, solely on the basis of the complaint and answer, plaintiff had moved for partial summary judgment asking the court to accept his contention that, essentially on considerations of size alone, the merger was *per se* illegal under both Section 1 of the Sherman Act and Section 7 of the Clayton Act (Id., pp. 108-110).

On May 20, 1971, after full briefs and argument by the parties on the two motions for summary judgment, the District Court (Judge Daugherty) filed an Order and Opinion denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment on the ground that the undisputed facts indicated that plaintiff's stated desire as to the place of his employment was the proximate cause of his termination rather than defendants' merger and that plaintiff therefore lacked standing to sue under Sections 4 and 16 of the Clayton Act. (Appendix to Petition 24-31, hereinafter cited as A. 24-31). Judgment in favor of defendants issued on June 7, 1971 (A. 32).

The Court of Appeals for the Tenth Circuit affirmed the judgment below on January 17, 1973, holding that there was no causal connection between the alleged antitrust violation and the injury claimed by petitioner and that the petitioner was not engaged in the area of the economy protected by the statutes under which he sued. It concluded therefore, that petitioner lacked standing to sue under Sections 4 and 16 of the Clayton Act. The Court of Appeals expressly did not review the correctness of the trial court's conclusion that appellant's desire as to his place of employment was the proximate cause of the termination of his employment (A. 21-23).

REASONS FOR DENYING CERTIORARI.

This case involves nothing more than the application of a well-settled principle to a particular set of facts. The "standing" rule applied by the courts below is based upon Sections 4 and 16 of the Clayton Act, 15 U. S. C. Sections 15 and 26, which require that a person must be injured "by reason of" or "by" an antitrust violation before he has standing to sue for that violation. The courts below applied this principle to the facts of this case and found that plaintiff lacked standing: (1) petitioner was not injured "directly" by the merger affecting Sunray and, (2) petitioner's termination was caused by his refusal to move to a new job at higher salary and not by the merger. The standing principle applied below does not conflict with decisions of this Court or with rulings of the other courts of appeals and the principle was correctly applied by the courts below to the facts of this case.

I. There Is No Conflict Among the Courts of Appeals on the Issue of Standing to Sue Under Sections 4 and 16 of the Clayton Act.

The courts of appeals have been uniform in limiting the persons permitted to sue for treble damages and injunctive relief for violations of the antitrust laws. This uniformity was recently recognized by this Court in its opinion in *Hawaii v. Standard Oil Co. of Calif.*, 405 U. S. 251, 263 n. 14 (1972):

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. [citations omitted]"

Recognizing that injuries to stockholders, employees and lessors may conceivably be traced back to conduct violative of the antitrust laws, each of the courts of appeals has nonetheless determined that the right to sue is limited to those whose injuries are "directly" caused by the violation or who are in the "target" area of the violation. For example:

First Circuit:

> "The injuries set forth thus seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U. S. C. A. §15." *Miley v. John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd*, 242 F. 2d 758 (1st Cir.), *cert. denied*, 355 U. S. 828 (1957). *See also, Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

Second Circuit:

> "In determining whether a plaintiff has standing under §4 of the Clayton Act, the only relevant factor is whether the plaintiff is a 'target' of the illegal activity." *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972). *See also, Billy Baxter Inc. v. Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971).

Third Circuit:

> "[T]he courts recognize that the Act does not give a right of action to every one who can trace a financial loss, however remote, to a violation of the antitrust laws." *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E. D. Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954). *See also,*

Kauffman v. Dreyfus Fund Inc., 434 F. 2d 727, 732-34, (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971).

Fourth Circuit:

"If the damage was merely incidental or consequential, or if the defendants' anititrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414, 419 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966).

Firth Circuit:

"If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484, 487-88 (5th Cir. 1967), *quoting, South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414, 419 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966).

Sixth Circuit:

"It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the antitrust laws directed against the supplier's customer." *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U. S. 907 (1963).

Seventh Circuit:

"The underlying question is: Could the State of Illinois bring a direct action against defendants? The

answer is 'no', because there was no direct proximate impact of the conspiracies on the consumers. The impact on them was remote and took the shape of allegedly higher rates paid for utility services. . . ." *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F. 2d 564, 567 (7th Cir.), *cert. denied sub nom. Illinois v. Commonwealth Edison Co.*, 375 U. S. 834 (1963).

Eighth Circuit:

"[T]here was directness of competition between Bergjans and Sanitary, that any recovery by Bergjans is not in the nature of a windfall, and the Bergjans' injury is something more than remote, is not derivative but direct, and is the proximate result of Sanitary's misdoing." *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F. 2d 679, 688-89 (8th Cir. 1966).

Ninth Circuit:

"[T]he rule is that one who is only *incidentally* injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358, 363 (9th Cir. 1955) (emphasis in original). *Accord, Hoopes v. Union Oil Co.*, 374 F. 2d 480, 485 (9th Cir. 1967).

Tenth Circuit:

"The newer and the older cases both present much the same terms to work with although expressed in somewhat different language. . . [W]e hold that under the authorities the plaintiff here has not alleged a cause of action under the Clayton Act because its position relative to the injuries resulting from the alleged acts of the defendants is too remote. . . [I]ts damages

resulting from the acts of defendants would come about 'indirectly', 'remotely', or as 'derivative damages.'" *Nationwide Auto Appraiser Service, Inc. v. Association of C. & S. Cos.*, 382 F. 2d 925, 928-29 (10th Cir. 1967).

In prior cases where simple salaried employment was the basis for the assertion of standing to sue for antitrust violations aimed at competition in the employer's market standing has been uniformly denied. *Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 338 (E. D. La.), *aff'd*, 323 F. 2d 363 (5th Cir. 1963); *Martens v. Barrett*, 245 F. 2d 844, 846 (5th Cir. 1957); *Conference of Studio Unions v. Loew's Inc.*, 193 F. 2d 51, 54 (9th Cir. 1951), *cert. denied*, 342 U. S. 919 (1952); *Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of U. S. and Can.*, 182 F. 2d 158, 167 (9th Cir.), *cert. denied*, 340 U. S. 827 (1950); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 113 F. 2d 114 (2d Cir. 1940), *aff'g*, 30 F. Supp. 389, 391 (S. D. N. Y. 1939); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 706, 709-10 (3d Cir. 1910); *J. O. Pollack Co. v. L. G. Balfour Co.*, 1973 CCH Trade Cas. ¶ 74,339 at p. 93, 592 (N. D. Ill. 1972); *Deaktor v. Fox Grocery Co.*, 332 F. Supp. 536 (W. D. Pa. 1971); *Bywater v. Matshushita Elec. Indus. Co.*, 1971 Trade Cas. ¶ 73,759 (S. D. N. Y.); *Contreras v. Grower Shipper Vegetable Ass'n.*, 1971 Trade Cas. ¶ 73,592 (N. D. Cal.); *Sargent v. National Broadcasting Co.*, 136 F. Supp. 560, 566 (N. D. Cal. 1955); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 916 (S. D. N. Y. 1955); *Gerli v. Silk Ass'n of America*, 36 F. 2d 959, 960-61 (S. D. N. Y. 1929); *Corey v. Boston Ice Co.*, 207 F. 465, 466 (D. Mass. 1913).

Numerous other decisions recognize, in dicta, that salaried employees lack standing to sue for violations aimed at competition in the employer's market. *Calderone Enter-*

prises Corp. v. United Artists Theatre Circuit, Inc., 454 F. 2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F. 2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971); *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484, 487-88 (5th Cir. 1967); *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358, 363 (9th Cir. 1955); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F. 2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956); *Waldron v. British Petroleum Co., Ltd.*, 231 F. Supp. 72, 84-85 (S. D. N. Y. 1964); *Schwartz v. Broadcast Music, Inc.*, 180 F. Supp. 322, 327-28 (S. D. N. Y. 1959); *Robinson v. Stanley Home Products, Inc.*, 178 F. Supp. 230, 233 (D. Mass.), *aff'd*, 272 F. 2d 601 (1st Cir. 1959); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956); *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E. D. Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954).

II. The Allegedly Contrary Authorities Cited by Petitioner Are Consistent With the Decisions Below.

Petitioner argues erroneously that *Hawaii v. Standard Oil Co. of Calif.*, 405 U. S. 251 (1972); *Perkins v. Standard Oil Co.*, 395 U. S. 642 (1969); *Radovich v. National Football League*, 352 U. S. 445 (1957); *Flood v. Kuhn*, 407 U. S. 258 (1972) and several circuit court opinions are inconsistent with the decisions below.

The allegedly contrary circuit court authorities, *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484 (5th Cir. 1967) and *Nichols v. Spencer International Press, Inc.*, 371 F. 2d 332 (7th Cir. 1967), were actions brought by plaintiffs who, unlike petitioner, were commission sales agents who developed their own territories and customers and therefore had a business or property in the competitive area affected by the violation. The Fifth Circuit has specifically distinguished

between application of the standing rule to the facts of the commission sales agent cases and the application of the same rule to the facts of cases brought by salaried employees like petitioner. *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484, 487 (5th Cir. 1967).

Hawaii is inapplicable to petitioner's case except insofar as it reiterates the requirement under Section 4 of the Clayton Act that a plaintiff must be injured in his "business or property" in denying Hawaii's standing to sue as *parens patriae* for injuries to its general economy. Except for the *parens patriae* issue, the decision effects no change in the existing rules on standing under either Section 4 or 16 of the Clayton Act and, in fact, the opinion recites without comment in a footnote the conclusion that "the lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy for damages for all injuries that might conceivably be traced to an antitrust violation. [Citations omitted]" 405 U. S. at 263, n. 14. In affirming this standard rule, the Court cited *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417 (7th Cir. 1942), which petitioner in his Petition cites as precedent for employee standing. In fact, the *Roseland* decision is simply another of the commission agent decisions discussed above and has no bearing on whether this petitioner, a salaried employee, has standing.

Petitioner's reliance on *Perkins v. Standard Oil Co., supra*, is equally misplaced. Perkins' situation does not remotely resemble plaintiff's status as an employee. Perkins owned both corporations directly affected by the illegal conduct; but more important, the court found on the record that his companies *and he* had been the specific target of the price discrimtination which constituted the violation. The Court stated that Perkins had been the "principle victim" and that he had been "directly injured." 395 U. S. at 649-50. That target analysis is at the heart of the Supreme Court's finding of injury and is entirely

consistent with the lower court's decisions on standing, including those in this action.

Plaintiff's citation of *Radovich v. National Football League, supra* and *Flood v. Kuhn, supra* again ignores the clear factual distinctions between those cases and his own action. In both cases, the plaintiffs were asserting a boycott by the leagues and clubs in question directed against them as players. Since they were the immediate object of the boycotts, they obviously were within the "target" area of the violation under any of the standing decisions of the courts of appeals.

III. The Individual Petitioner in This Action Can Establish No Causal Connection Between the Alleged Violation and His Injury, Since His Termination Was Due to His Voluntary Refusal to Transfer to a New Job at a Higher Salary.

Plaintiff suffered no "injury", unless by his voluntary rejection of a new job at a higher salary he injured himself. The District Court below concluded that "[petitioner's] stated desire as to the place of his employment was the proximate cause of his termination of his employment as a matter of law." (A. 30). The court of appeals did not review that conclusion (A. 23).

The facts support the lower court's conclusion. More than a year after its merger with Sunray, Sun elected to reorganize its Wholesale Department, and in so doing, decided to utilize plaintiff's services in a meaningful way and at a higher salary. Far from dismissing plaintiff, Sun offered him three alternative new assignments at an immediate increase in salary, the first being one which he admits was described to him as one of the most important in the reorganized department.

The cases cited *supra* fully support an argument that even had Sun decided to dispense with plaintiff's services the day after the merger, the resulting "injury" would be

too indirect in terms of the violation charged—a merger, the illegality of which, if established, would only arise from a significant probable or actual adverse effect upon competition, not on employees. *A fortiori,* whatever "injury" resulted from plaintiff's decision to leave Sun in a subsequent reassignment of jobs rather than to accept a new job in a new location at a higher salary is too remote, too much a happenstance consequence and too infected with plaintiff's own volitional act to meet any causation test.

The most basic test for standing to sue under both Section 4 and 16 of the Clayton Act is causation of the injury "by reason of" or "by" the unlawful conduct, and, on the facts of this case the district court was correct in concluding that petitioner cannot meet this prerequisite.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,

Respondents.

KEN F. MANS, individually and on behalf of all persons employed by Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,

Petitioners,

v.

SUNRAY D-X OIL COMPANY and SUN OIL COMPANY,

Respondents.

DEL JEANNENE JOBE individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY BRIEF

This reply brief serves the dual purpose of calling attention to material not available to Petitioners when the original petition was filed; and of responding to the briefs filed by the Respondents.

I. Supplemental Material

Since the initial petition was filed in this case, much has transpired to magnify the national importance of the issues involved. President Nixon, in announcing cuts in federally funded social programs, declared that he is "irrevocably committed . . . to fulfilling the American dream for all Americans." He stated that he was not so much interested in "simply a system of government helping people," but rather one "under which government helps poor people to help themselves and one another." Tulsa Daily World, March 2, 1973, p. 2A, col. 5. This represents the very foundation of the federal antitrust laws. In passing the Celler-Kefauver Act, Congress observed that economic power concentrated in the hands of private persons would necessarily lead "to big bureaus of the Government." H.R. Rep. 1191, 81st Cong., 1st Sess. 13 (1949). Much the same was said in the earlier report issued by the Temporary National Economic Committee. (Temporary National Economic Committee, Investigation of Concentration of Economic Power, S.Doc. 35, 77th Cong., 1st Sess. (1940) (hereinafter referred to as the TNEC Report).)

The American dream, recently reaffirmed by President Nixon and staunchly defended by Congress through the antitrust laws, is a simple principle of liberty and justice for all. Abraham Lincoln best explained this cherished liberty when, in his reverent Gettysburg address, he stated: "our fathers brought forth on this continent a new nation, conceived in Liberty and dedicated to the proposition that all men are created equal." Lincoln spoke of a great civil war that was testing whether this Nation could long endure, and he stated:

> "that we here highly resolve that these dead shall not have died in vain . . . that this nation, under God, shall

> have a new birth of freedom . . . and that government of the people, by the people, for the people, shall not perish from the earth."

Exercising absolute control over the lives of employees who dedicated years of work, Atlantic Richfield, Sun Oil Company, and Amerada Hess would change the words of Lincoln to read: government of corporations, by corporations, and for corporations. But Congress, seeking a more vigorous antitrust enforcement policy, stated that corporations were created only as an instrument to serve the people.

> "If the political structure is designed to preserve the freedom of the individual, the economic structure must not be permitted to destroy it." TNEC Report at 5.

Because the people have not been willing to stand up to demand that big corporations comply with the antitrust laws, the American dream is being destroyed. This was predicted by Congress when we were warned that unless the trend toward economic concentration was stopped, the people would find themselves under authoritative corporate control. In 1941, Congress observed:

> "It is quite conceivable that the democracies might attain a military victory over the aggressors (World War II) only to find themselves under the domination of economic authority far more concentrated and influential than that which existed prior to the War." TNEC Report at 3.

Mr. Justice Harlan had earlier noted in *Standard Oil Co.* v. *United States,* 221 U.S. 1, 83 (1911) (concurring and dissenting opinion) that the people of this Country were being committed to slavery "from aggregations of capital." Unless the trend toward economic concentration was reversed, there was a fear that "the opportunity of those in-

dividuals who will constitute the next generation will be completely foreclosed." TNEC Report at 9.

All of these fears have become a reality according to a report, "Work In America", recently released by the Secretary of the Department of Health, Education, and Welfare. Although corporate mergers and economic concentration was not singled out, the HEW Task Force observed:

> "Our economic, political, and cultural system has fostered the notion of independence and autonomy, a part of which is the belief that a hardworking person, even if he has little capital, can always make a go of it in business for himself. Or, to put it another way, if things get too bad in a dependent work situation, it has been felt that the individual could always strike out on his own.
>
> "This element of the American Dream is rapidly becoming myth, and disappearing with it is the possibility of realizing the character traits of independence and autonomy by going into business for oneself." Report of a Special Task Force to the Secretary of Health, Education, and Welfare, Work In America, 20-21 (MIT Press ed. 1973).

Under the great American dream, a man was free to work as an employee, but he was also free to strike out on his own. He was free to go into his own business and compete with his ex-employer. This was possible under the economic concepts envisioned by Congress when the antitrust laws were enacted. The basic assumption drawn from the history of all antitrust statutes was to:

> "Perpetuate and preserve, for its own sake, and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."

United States v. *Aluminum Company of America*, 148 F.2d 416, 429 (2d Cir. 1945).

Corporate mergers are converting this Nation and its economy into a system of big business, big labor and big government. As found by the HEW Task Force.

> "the trend is toward large corporations and bureaucracies which typically organize work in such a way as to minimize the independence of the workers and maximize control and predictability for the organization."
>
> "Work In America", at 21.

It was found that: "Self employed persons dropped from 18% in 1950 to 9% in 1971"; and 90% of our employed people in 1970 were wage and salary workers. *Id.* at 21.

Corporations have not been content with the trend that will soon make all our people wage earners. In an effort to guard against future competition, corporations require certain employees to sign agreements not to compete. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 24 Cal. App. 3d 35, 100 Cal. Reptr. 791 (1972), cert. granted 93 S. Ct. 96 (1973). Denied the right to enter his own business; destined only to be an employee; employed only by the arbitrary will of the corporation rather than by the forces of free competition; victimized by corporate antitrust violations; AND NOW DENIED STANDING IN THE COURTS . . . what is left for American workers? The HEW Task Force answers this question with a conclusion that "either the absence of work or employment in meaningless work is creating an increasingly intolerable situation." "Work In America" at 186. The squandering of human life is the direct result of corporate mergers.

One of the most significant findings of the HEW Task Force involved the anxieties, frustrations and alienation of

American workers. A principal cause of these feelings, experienced by blue-collar workers, white-collar workers, and middle management, involved the impersonal nature of jobs. Corporations have grown so large that the individual employee has lost his identity. Based upon the total findings of the HEW Report on "Work In America", it is not difficult to understand the most serious and alarming Gallup Poll, recently released, that revealed that 11% of Americans would go to settle in another country if they were free to do so. (The Tulsa Tribune, Feb. 26, 1973, p. 13A, col. 3).

According to this Gallup Survey, 14% of those persons with a college background would leave the United States; and 19% of those persons under 30 years of age would leave. In a country founded upon the sacred principles of liberty and justice for all, it is appalling to think that 1/5th of country's young people would leave to settle in foreign lands. Perhaps the answer lies in the possibility that we no longer have the freedom and opportunities that our founding fathers sought when they settled this great land. Instead of freedom and opportunity, our people live under the authoritative control of big corporations that have, in the name of efficiency, grown into mighty empires through illegal corporate mergers. As President Roosevelt stated to Congress: "Industrial efficiency does not have to mean industrial empire building." TNEC Report at 13.

A brief summary of the findings of the HEW Task Force will clearly demonstrate the national importance of the issues in this case, and why this Court should grant the Writ requested.

1. *Elderly workers*: There was found to be a direct relationship between work and health. Many workers forced into retirement begin a rapid de-

terioration. It was also found that: "Some workers are victimized by such sinister practices as being fired just before they are eligible to receive benefits or through hanky-panky played with *pension funds in mergers*, as well as by mismanagement, bankruptcies, and the like." "Work In America" at 72 (Emphasis added).

2. *Blue-collar workers*: It was found that blue-collar workers no longer believe "that there is a great deal of opportunity to move up the ladder of success." *Id.* at 32. Interviews conducted by the HEW Task Force revealed an "almost overwhelming sense of inferiority" among blue-collar workers. *Id.* at 35.

3. *White-collar workers*: White-collar workers, "once grateful for having been spared the dehumanization of the factory" (*Id.* at 38), suffer the same alienation experienced by blue-collar workers. It was found that the size of corporate organizations has imparted "to the clerical worker the same impersonality that the blue-collar worker experiences in the factory." *Id.* at 38.

4. *Middle-management*: Much middle management discontent was also found by the HEW Task Force. "A general feeling of obsolescence appears to overtake middle managers when they reach their late 30's. Their careers appear to have reached a plateau, and they realize that life from here on will be along an inevitable decline." *Id.* at 41.

5. *Young workers*: It was found that young people are rejecting the authoritative control of corporate bureaucracy, but they have not rejected the value of work. *Id.* at 47. "The young worker is in revolt

not against work but against the authoritarian system developed by industrial engineers who felt that 'the worker was stupid, overly emotional . . . insecure and afraid of responsibility'." *Id.* at 50.

6. *Minority workers*: Minority workers and their families are even more serious casualties of the work system. "One out of three minority workers is unemployed, irregularly employed, or has given up looking for a job." *Id.* at 51. The most immediate need of minority workers is for a job that pays enough to support himself and his family. *Id.* at 51.

All people need work for economic and psychological reasons. "To be denied work is to be denied far more than the things that paid work buys; it is to be denied the ability to define and respect one's self." *Id.* at 8. " 'Without work all life goes rotten. But when work is soulless, life stifles and dies.' " *Id.* at 186. *The HEW Report on "Work In America" is a reflection of all the fears earlier expressed by Congress as the antitrust laws were debated and passed. These are the same reasons that clearly show that Congress intended that "employees" be included in the term "business or property" of Section 4 of the Clayton Act.*

In the Clayton Act debates, Congressman Casey observed that "business" is: "That which occupies time, attention, and labor of men for the purpose of livelihood or profit; that which occupies the time, attention and labor of man for the purpose of profit and improvement." 51 Cong. Rec. 9559 (1914). Congressman Casey further stated that "business" was: "That which busies or that which occupies the time, attention, or labor of one as his principal concern . . ." 51 Cong. Rec. 9559 (1914). Offering an explanation of these definitions, Congressman Casey stated:

"It will be seen from the definitions that while there is a fundamental difference between property and business there is none at all between business and labor . . ." 51 Cong. Rec. 9559 (1914).

II. Reply to Respondents

As concluded by the HEW Task Force, American workers are caught between problems of unemployment and problems of inflation. "Work In America" at 153. When the government creates a large number of jobs to relieve the pain of unemployment, there is an inflationary trend that takes money out of the pockets of all. But the fact is that corporate mergers and the resulting increases in economic concentration contribute greatly to unemployment and inflation.

Competition is the most effective tool to create jobs and to stop inflation. Hearings Before the Senate Subcommittee on Antitrust and Monopoly on Economic Concentration, S.Doc. 191, 89th Cong., 2d Sess. p. 1863 (1966). In the petroleum industry, experiencing one of the fastest merger trends, the major companies have gained control of crude oil production and refining. (For the list of oil company mergers see Atlantic Appendix pp. 72-77.) Through corporate mergers, these companies have eliminated many jobs; have substantially reduced domestic crude oil production; and have created a market with highly stabilized prices. What the oil companies were not allowed to do by this Court in *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940), they have been able to accomplish through corporate mergers. Employees have been the ones who have suffered the most from the elimination of competition in this critical industry.

A. Response to Atlantic Richfield

1. Employees have a definite interest and concern in the business of their employer and they are direct participants in the economic market of their employer.

In its brief in opposition, Atlantic asserts and seeks to defend the conclusion that Reibert had no interest in the business of Sinclair. (Atlantic's Brief in Opposition p. 3). This insensitive and impersonal corporation attitude toward employees, many of whom have devoted their lives and have worked hard for an expected pension and security, is a good illustration of the employee frustration and alienation found and reported by HEW in "Work in America."

The simple fact is that employees *are* Atlantic Richfield or Sinclair. There may be capital paid in by shareholders; nevertheless, there is no life in a corporate structure except through employees. There is no competition in the market place except through the action of employees. Atlantic and other giant oil companies explore and produce oil; research for new methods of production; and refine and market products only through employees. Abraham Lincoln recognized this superiority of labor over investment when in his annual message to Congress on December 3, 1861, he stated: "Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration." *V. Basler,* "The Collected Works of Abraham Lincoln", 52 (1953), as cited by Justice Douglas in *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169, 186 (1961) (dissenting opinion).

2. Employees terminated by reason of an illegal corporate merger are injured by reason of an antitrust violation.

Atlantic, by citing cases from all circuits (a list covering three pages of the brief in opposition), seeks to discredit the importance of the issue presented to this Court. Although the cases relied on by Atlantic (Atlantic's Brief in Opposition pp. 5-7), bear no resemblance to the facts in the present case, they are cited and listed in an effort to make the claim of the injured employees appear frivolous and unimportant. The Tenth Circuit's holding was described as a "routine application of the well-established antitrust standing rule." (Atlantic's Brief in Opposition p. 14).

If Atlantic actually considers the employee claim to be frivolous and unimportant, it is difficult to understand why it took the lower courts such a long time to resolve the issue. The plaintiffs have vigorously prosecuted their claims in the lower courts for approximately four years and as of today the issue of standing, the most preliminary question, has not been finally resolved. This would indicate that the issue was not even clear to the lower courts.

The cases relied on by Atlantic relate to the undisputed issue of causation. There is no dispute about the requirement that the employees must prove that their injury resulted from an antitrust violation. This is as required by Sections 4 and 16 of the Clayton Act. *The real issue is from what act or event is this causation measured?*

Atlantic seeks to confuse the issue of proximate cause by contending that causal connection is measured from the anti-competitive effects or the "lessening of competition." It is contended by the employees that causal connection can only be measured from the merger. Section

4 of the Clayton Act grants standing to any person injured in his business or property by reason of *anything forbidden* in the antitrust laws. It is conceded by Atlantic and the lower court that the employees were injured by the merger. This means that causal connection has been satisfied, for the "forbidden act" is the merger.

Judicial authority, cited in the petition, supporting the antitrust claim of employees is brushed aside by Atlantic without any rational explanation (Atlantic's Brief in Opposition p. 12). It is not difficult to eliminate judicial conflict by illogical distinctions. For example, *Radovich* v. *National Football League,* 352 U.S. 445 (1957) and *Flood* v. *Kuhn,* 407 U.S. 258 (1972) were distinguished by Atlantic with the observation that those were not standing cases.

Atlantic ignores the fact that the courts considered the merits of the *Radovich* and *Flood* antitrust claims. This meant that the employee-football and baseball player had standing under the antitrust laws. Furthermore, since the courts considered it unnecessary to consider the standing issue in *Radovich* and *Flood,* these cases are even stronger precedent in the present case.

In an effort to discredit the *Radovich* and *Flood* precedent, Atlantic makes the assertion that the employees in the present case "suffered incidental remote injuries", but that employee Radovich and employee Flood "were the very targets of the violation alleged." (Atlantic's Brief in Opposition pp. 12-13). The same illogical distinction is offered by Atlantic in an effort to explain away *Perkins* v. *Standard Oil Co. of Calif.,* 395 U.S. 642, 649-50 (1969).

The employees in the present case were *the very targets of the violation alleged.* It was alleged in this case that the Atlantic-Sinclair merger violated the antitrust

laws and that the employees were injured as a direct result of this merger. In *Perkins*, this Court stated that Perkins, the employee, "was the principal victim of the *price discrimination* practiced by Standard." *Perkins* v. *Standard Oil Co. of Calif., supra* at 649 (emphasis added).

This Court, in the *Perkins* case, measured causal connection from *price discrimination* which is the act forbidden under Section 2 of the Clayton Act. Perkins was not required to show that his injury was by reason of the "lessening of competition" that resulted from the price discrimination. Section 7 of the Clayton Act prohibits mergers, and in the present case Atlantic admits and, the lower court concedes, that the employees were injured as a direct result of the merger.

3. The effect of Atlantic's causal connection argument would severely limit the scope of antitrust enforcement.

If the argument of Atlantic were adopted as the standard for causal connection, a summary disposition of a case would never be possible. Atlantic would require that the employees who lost their jobs and pensions as a direct result of its merger with Sinclair to prove that the injury resulted from a "lessening of competition." This could be done only after a complete trial of the facts to prove the exact and complete scope of the anticompetitive effects of the merger. To accept this illogical conclusion would make private enforcement of the antitrust laws totally meaningless.

Atlantic is asking this Court to judicially repeal Sections 4 and 16 of the Clayton Act. On page 15 of its opposition brief, Atlantic argues that: "The rule applied in the present case . . . brings a vital element of precision

to antitrust law." Some commentators make the same suggestion. Professors Kaysen and Turner urged that: "There should be no private right of action based on the acquisition of 'unreasonable market power.'" C. Kaysen & D. Turner, "Antitrust Policy, An Economic and Legal Analysis" 258 (1959). This, however, must be rejected since the statute and legislative purpose clearly and explicitly provides for and encourages private enforcement. If this law is to be changed, Atlantic must seek the change through the legislative process.

Private suits were considered by Congress to be the most effective way of insuring the desired vigorous enforcement of the antitrust laws. Senator Norris stated that the solution to the trust problem required at least one of two things: "Make it financially unprofitable for anyone or any set of men to organize a trust [or] provide by proper criminal law, jail sentences for those who organize and control trusts in violation of the law." 51 Cong. Rec. 16051 (1914). During the debates of the Clayton Act, the criminal penalty was deleted and greater emphasis was placed on private suits. As Congressman Floyd noted, the private remedies would be far more effective than the criminal sanction. 51 Cong. Rec. 16319 (1914).

Atlantic would now eliminate the only effective private plaintiff from challenging its illegal acts. It is suggested by Atlantic:

> "the courts have long confined the protection of these laws to the *participants* in the market which is the target area of the prohibited conduct." (Atlantic's Brief in Opposition p. 11) (emphasis added).

Who are the "participants in the market" to whom Atlantic would rely upon for insuring a vigorous anti-

trust enforcement? The Atlantic-Sinclair merger could have been challenged by Sun Oil or Sunray D-X; however, these two companies were engaged in their own merger plans. Amerada Petroleum or Hess Oil and Chemical could have challenged the merger of Atlantic and Sinclair; but they too were involved with their own merger. The same conclusion would be reached with any other company that Atlantic would agree is a participant in the market. In the petroleum industry, the merger trend has been among the fastest. (See list of oil company mergers in the Atlantic appendix submitted to Tenth Circuit pp. 72-77.) (Hereinafter, this appendix will be referred to as R.)

Among these companies, there has been very little inclination to enforce the antitrust laws. Although far more financially able than terminated employees, these companies have responded to the merger trend by merging themselves. Principally as a result of the merger trend in the petroleum industry, production, refining and marketing has become highly concentrated:

(a) In 1960, twenty large oil companies controlled 76% of the refinery capacity in the United States. In 1968, sixteen large oil companies controlled 75% of the total refinery capacity (R. pp. 121-122).

(b) From 1940 to 1968, the total number of operating refineries decreased from 461 to 264 (R. p. 123).

(c) In 1968, the 15 largest oil companies combined had a crude oil self sufficiency of 98.8% (R. p. 125).

(d) Since 1959, crude oil prices have been highly stabilized (R. p. 125).

These few facts alone illustrate the market effect of the oil company merger trend. In *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940), the facts

involved a plan by the oil companies to remove surplus gasoline from the market. This Court held that the "dancing partner" plan was illegal under Section 1 of the Sherman Act. *Id.* at 221. What the major oil companies were not allowed to do by agreement, they have effectively accomplished through corporate acquisitions. Instead of having "dancing partners" to control the supply of product to be placed on the market, the major oil companies have acquired the independent producer and the independent refineries.

This substantial reduction in competition has been at the expense of employees who have lost their jobs, economic security, prestige of employment, and retirement with a pension. But then all the American people are suffering from this reduction in competition.

4. Employee standing to challenge illegal mergers presents no serious threat of a flood of cases.

Atlantic, in its brief, completely ignored the legislative history of Sections 4 and 16 of the Clayton Act that supports employee standing and that recognizes a causal connection between mergers and the loss of jobs. Instead of facing up to and responding to these important issues, Atlantic suggests that the denial of standing:

> ". . . prevents the flood of private antitrust suits which would otherwise engulf the federal courts. . . ." (Atlantic's Brief in Opposition p. 15).

Regardless of how inviting it might be to deny standing, the suggestion of Atlantic is totally without substance. The employee standing issue must be decided on its merits and not denied out of fear that more private cases might be filed. With this employee standing issue, we are dealing with certain basic and fundamental rights of people.

The alternative is the lack of antitrust enforcement and a windfall to corporations engaged in illegal activity.

The petitioner is mindful of the "Problems of the Judiciary" wherein the case load of courts at all levels has experienced a substantial increase. It is suggested, however, that there need not be any flood of cases filed by employees. Factors that will restrict the number of cases include:

(a) The class action;

(b) The expense involved in prosecuting antitrust claims; and

(c) Obedience to the law by corporations.

Congress favored private enforcement in order to ensure obedience to the antitrust laws. As Senator Borah observed:

> "There could be no safer guardian for the Sherman Antitrust Law than the hundreds and thousands of people who are injured by these monopolies if the law were made easy of enforcement so far as they are concerned." 51 Cong. Rec. 15986 (1914).

There was some fear expressed that the scope of the treble damage provision would possibly lead to "blackmail" suits. 51 Cong. Rec. 16275 (1914) (remarks of Congressman Levy). It was argued that there was nothing to protect businessmen from these suits. "This bill," observed Congressman Levy, "is all in favor of the complainant." *Id.* Replying to this fear, Congressman Webb said: "I do not know any way to stop a man from making accusations or bringing a suit, but people soon get tired of bringing blackmailing suits when they are mulcted in costs, and there are not very many such suits brought." 51 Cong. Rec. 16275 (1914) (remarks of Congressman Webb).

5. Atlantic erroneously suggests that there has been a tacit Congressional approval for a denial of standing to employees.

In its Brief in Opposition, Atlantic offered absolutely no response to the clear Congressional expressions which recognized employee standing under the antitrust laws, and which further recognized a causal connection between mergers and loss of employment. Atlantic simply closed its eyes to this legislative policy and blindly stated that the injured employees be required to go to Congress for relief. (Atlantic's Brief in Opposition p. 16).

Employees have been to Congress and have received protection from that law making body.

(a) In 1890, Congress passed the Sherman Antitrust Act to put an end to great aggregations of capital "because of the helplessness of the individual before them." 21 Cong. Rec. 2457 (1890) (remarks of Senator Sherman). The Sherman Act treble damage provision gave standing to the "farmer, mechanic, *laborer* and consumer." 21 Cong. Rec. 3150 (1890) (remarks of Senator George).

(b) In 1914, Congress supplemented the Sherman Act by passing the Clayton Act which placed emphasis on enforcement of the antitrust laws. Persons recognized as suffering the most from great economic combinations included "the employee who loses his job." 51 Cong. Rec. 16043 (1914) (remarks of Senator Norris).

(c) Employees and employment opportunities could, according to Congress, best be protected by the forces of free competition. When Congress started to re-

duce free competition in the area of railroads, specific statutory employee protection was provided. (Petition pp. 23-25). The Act was directed to disapprove any railroad merger that would result in the employees "being in a worse position with respect to their employment." [49 U.S.C., Sec. 5 (2) (f)].

(d) In 1940, a Congressional study of mergers and economic concentration explicitly called for a halt in the trend toward economic concentration, reasoning that: "It is the fundamental duty of every society . . . to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man." (TNEC Report at 6).

(e) In 1950, Congress in passing the Celler-Kefauver Act reaffirmed its support of free competition as the principal protection for employees. Opposition was expressed to the necessary growth of large labor unions that comes with economic concentration. H. R. Rep. 1191, 81st Cong., 1st Sess. 13 (1949).

If employees are no longer entitled to the protection of free competition guaranteed to them by the antitrust laws, Congress must make the change. As previously stated, the American worker has gone to Congress and has received protection. If the forces of free competition are too much of a burden to Atlantic Richfield, Sun Oil, Amerada Hess, and the other oil companies, it is they who should seek a Congressional exemption. Certainly with the enormous economic power accumulated by these companies, they are in far better position than are the workers made jobless by illegal mergers.

B. Response to Amerada Hess Corporation

The brief in opposition to the petition filed by Amerada is no more persuasive than the brief filed by Atlantic Richfield. It follows the same pattern of logic used by Atlantic that is designed to divert attention from the real problems and substantive arguments presented in the petition. Instead of addressing itself to the clear expressions of Congress, the Amerada brief is only a compilation of undisputed legal statements and inaccurate appraisals of the importance of employees.

Both Atlantic Richfield and Amerada shy away from the definition of "business or property", almost conceding that employment falls within the statutory terms. This is apparently done to focus more attention on the claim that the employees fail to satisfy the causal connection requirement of Sections 4 and 16 of the Clayton Act (Amerada's Brief in Opposition p. 3).

1. Amerada says: "This Court has repeatedly denied certiorari in cases involving the directness or 'target area' requirement." (Amerada's Brief in Opposition p. 8).

Amerada first characterizes this case as the routine antitrust case that offers no novel or important antitrust issue. From this step, Amerada counts the number of times that this Court has in fact denied certiorari, and then offers the simple conclusion that certiorari should be denied here. With such logic, Amerada would leave the American worker prey to the great concentration of economic power of corporations seeking to establish a loophole in the antitrust laws that were passed to preserve the American dream that all men are created equal and are free to strike out on their own if and when employ-

ment conditions become unbearable. With its weak logic, Amerada gives little credit to this Court's ability to appreciate the real importance of the issues involved.

2. Amerada says: "Standing is accorded only to those directly injured by an antitrust violation and is denied to those whose injury is indirect, secondary, derivative or remote." (Amerada's Brief in Opposition p. 6).

This statement was a summation of a combination of cases cited by Amerada from seven of our ten Circuits (Amerada's Brief in Opposition pp. 4-6). As indicated in response to Atlantic Richfield, there is no dispute about the need to show a causal connection between injury to employment and the alleged "antitrust violation." It is asserted, however, that his requirement was satisfied by the employees. The lower court made the following statements that conclusively establish the directness requirement:

(a) "No evidence has been submitted intimating that appellant's discharge was for any reason other than the duplication in jobs occasioned by the merger." (Petition, Appendix A4) (emphasis added).

(b) "The issue boils down to whether or not antitrust laws are directed toward employees injured by an alleged illegal merger." (Petition, Appendix A5).

(c) "Termination of employment will often occur whether a merger is legal or illegal." (Petition, Appendix A11).

(d) "At best, appellant's discharge was no more than an outgrowth of the alleged unlawful merger." (Petition, Appendix A12).

Without any question, the lower court found that the employees were injured as a direct result of the alleged illegal mergers. Amerada does not question this directness, but rather argues that the employees must show more. To have standing, according to Amerada and the lower court, the employees must connect their injury to the "lessening of competition." This is the rewriting of Section 1 of the Sherman Act and Section 7 of the Clayton Act advocated by Amerada. (Amerada's Brief in Opposition p. 11).

The Tenth Circuit and Amerada would read out of Section 7 of the Clayton Act the word "acquisition." Explicitly, Section 7 of the Clayton Act provides that no corporation shall acquire the stock or assets of another corporation. (15 U.S.C., Sec. 18). Amerada interprets this section to mean that it is the "lessening of competition" that is the forbidden act. If this were true, the original Section 7 of the Clayton Act, although covering only stock acquisitions, would have been equally sufficient to cover asset acquisition. This kind of logic necessarily concluded from the reasoning of Amerada was however earlier rejected by this Court. *Arrow-Hart & Hegeman Elec. Co.* v. *FTC,* 291 U.S. 587 (1934); *Thatcher Mfg. Company* v. *FTC,* 272 U.S. 554 (1926). In these early cases, this Court ruled that the original Section 7 did not apply to asset acquisitions since the statutory prohibited act was limited to stock acquisitions.

3. Amerada says: "Sociological tracts as to the importance of a free market economy or the value of the 'work ethic' are simply beside the point." (Amerada's Brief in Opposition p. 11).

Perhaps to Amerada the social aspects of the antitrust laws are immaterial; they are not however to the American worker who receives the full thrust of the illegal merger. Neither are the so-called "sociological tracts" beside the point to Congress or to this Court.

Congress considered the tendency toward economic concentration to be "undesirable from a social standpoint." *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95, 103 (S.D. N.Y. 1964). The Sherman Act was passed by Congress in a social setting of economic suppression. The late Mr. Justice Harlan saw the people of this country being placed in bondage to the great aggregations of capital controlled by a few individuals and corporations. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 83-84 (1911). With this concentrated economic power, there was a philosophy that workers should be suppressed into industrial slavery, and that the enormous profits should be distributed to the relatively small number of shareholders. L. Brandeis, *The Curse of Bigness* 38 (1935). Life of the American workers was described as being ". . . so inhuman as to make our former Negro slavery infinitely preferable." *Id.*

All members of our society, seeking protection of their special interest, must of necessity rely on the preservation of the economic way of life constructed upon the forces of free competition. The nature of the special interest is immaterial; it may involve business interest, employment protection, or consumption. We all live under the competitive directive. It is therefore impossible to have

separate economic systems—one for business and capital investments and one for employment interests. The federal antitrust laws were passed to protect a single economic system—an organization of industry in small units in which all men are free to compete. *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945). This is a description of the "American dream" that according to the HEW report on "Work in America" is being shattered by the bigness and impersonal nature of corporations.

Amerada seeks to have this Court disregard the sociological tracts, the "work ethic" and the legislative purpose of the antitrust laws. Yet, man without work is dead; and unless the merger trend can be halted, our people cannot long survive.

C. Response to Sun Oil Company

Sun Oil, Atlantic Richfield, and Amerada each ignored the Congressional policy that supports employee standing and recognizes the causal connection between employee injury and corporate mergers. Each of the respondent-national oil companies failed completely to respond to important legislative issues raised in the petition. No response was made because there is no answer to the clear expressions of Congress. This is also the weakness of the opinion handed down by the 10th Circuit.

The oil companies would have this Court ignore the statute and legislative history of Sections 4 and 16 of the Clayton Act. They seek a policy decision that would rewrite the statute to deny any legal redress to employees who have worked hard to build retirement benefits, and who must work to satisfy their economic, moral and psychological needs.

Instead of searching for answers to explain the consistent pattern of Congressional antitrust action to protect employment, Sun Oil, the same as Atlantic Richfield and Amerada, overly simplifies the problems and desperately seeks to dilute the importance of the questions raised.

1. The judicial authority cited by Sun Oil is inapposite to the issues involved.

Sun Oil, the same as Atlantic Richfield and Amerada, travelled through all the United States Circuits to establish the proposition that there must be some directness between the alleged injury and the alleged antitrust violation. Six out of a total of nine pages in its brief, covering "reasons for denying Certiorari", were devoted to the simple causal connection proposition. This issue has never been disputed by the petitioner-employees.

There is no need to repeat the arguments made about the fallacy of Sun Oil's emphasis on the need for directness. The 10th Circuit concluded that the employees' alleged injury resulted from an illegal corporate merger. This is enough to satisfy the statutory requirement of directness since the antitrust violation is the merger itself—not the lessening of competition. As stated previously, the lessening of competition is important only for separating legal and illegal mergers.

One matter that does need some discussion is the relevancy and persuasiveness of the authority relied on by Sun Oil. A list of cases, impressive only in terms of number, is used by Sun Oil in support of the statement that:

"In prior cases where *simple salaried employment* was the basis for the assertion of standing to sue for anti-

> trust violations aimed at competition in the employer's market standing has been uniformly denied." (Sun Oil's Brief in Opposition p. 10) (Emphasis added).

None of the cases included in the list can be compared to the facts in the present cases. In most of these cases, the alleged antitrust violation was directed at the employer and did not involve the participation of the employer. Nor did these cases involve corporate mergers which are aimed directly at the employees. Why do similarly structured corporations enter into merger agreements except to eliminate employees? By consolidation and reduction in competition, a corporation can maintain its production level with fewer employees. The number of employees terminated will be in the direct proportion to the lessening of competition.

The closest case, factually, cited by Sun Oil is *Corey* v. *Boston Ice Co.*, 207 F. 465 (D. Mass. 1913). This case, however, has now been totally discredited. *Vardervelds* v. *Put & Call Brokers & Dealers Ass'n*, 34 F. Supp. 118 (S.D. N.Y. 1972); and *Wilson* v. *Ringsby Truck Lines, Inc.*, 320 F. Supp. 699 (D. Colo. 1970). Furthermore, the *Corey* case decided in 1913 was rejected by Congress when it approved Sections 4 and 16 of the Clayton Act in 1914. One of the reasons for passing a duplicate treble damage provision was offered by Congressman Floyd who observed that the Sherman Act treble damage provision:

> "has been of little value and practically useless in the past, because the individual, the small man, and the small concern, were utterly helpless in their efforts to confront in the Courts those great and powerful corporations." 51 Cong. Rec. 9490 (1914).

There would have been no way that Congress could have changed the language of the treble damage provision to make it clearer. Under the Sherman Act and now in the Clayton Act, the treble damage provision is expressed in the broadest possible language. It says that *any person* injured in his *business or property* by reason of *anything forbidden in the antitrust laws* can seek treble damages. (Sec. 4 of the Clayton Act, 15 U.S.C., Sec. 15). There is just no way for this language to be changed in order to expand the class of persons who would represent reliable private attorney generals. Certainly it was intended that employees injured as a result of an illegal merger be included in the class.

One is only left to speculate as to why employees have waited so long to seek judicial relief against injury resulting from illegal corporate mergers. Their inaction cannot, however, be used to affect the right of employees to now seek the relief. *United States* v. *duPont & Co.*, 353 U.S. 586 (1957); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). An explanation of this prior inaction might be that the swiftness of the merger trend during the last few years has now created a critical employment problem. With the present case, this Court is not faced with an isolated corporate merger.

On the face of the petition, this Court has before it a merger trend within a single industry. Employees now terminated as a result of a corporate merger have fewer places to go. They are now, as a result of the merger trend, backed up against the wall. In desperation, employees must now seek the aid of this Court to gain their right provided by Congress. This right is access to the Courts under the antitrust laws.

As Sun Oil places significant emphasis on inapposite cases, it seeks to discount more relevant cases by spurious and illogical distinctions. Sun Oil argues that *Hawaii* v. *Standard Oil Co. of Calif.*, 405 U.S. 251 (1972) is inapplicable since that case only involved the *parens patriae* theory (Sun Oil's Brief in Opposition p. 12). This Court's holding on the *parens patriae* issue is one of the reasons why it is so essential to recognize employee standing. If there were reliable persons to seek enforcement of the antitrust laws, there would be less reason for employees to seek this relief. But with free competition being destroyed and economic power becoming so highly concentrated, employees must initiate the action. They cannot rely on the state acting in its *parens patriae* capacity; and they can no longer wait for persons more financially able. Calling for Congress to halt increases in economic concentration, President Roosevelt reminded us that:

> "No people, least of all a democratic people, will be content to go without work or to accept some standard of living which obviously and woefully falls short of their capacity to produce. No people, least of all a people with our traditions of personal liberty, will endure the slow erosion of opportunity for the common man, the oppressive sense of helplessness under the domination of a few, which are overshadowing our whole economic life." (T. N. E. C. Rept. at 15).

Employees, the very heart of the strength of this Nation, should not be made to endure the pain that results from the erosion of free competition. Again to quote President Roosevelt: *"The enforcement of free competition is the least regulation business can expect."* (T. N. E. C. Report at 16) (Emphasis added).

2. Sun Oil offers a factual argument that would deny standing to petitioner because he refused to accept a transfer to a new job.

Following the merger of Sun Oil and Sunray D-X, the petitioner was offered a chance to continue in the employ of Sun Oil. The condition was that he leave Tulsa, his home for 17 years, and move to another location. Sun Oil cannot comprehend the effect that abrupt transfers have on employees. It is argued that the petitioner was not injured as a result of the merger, but rather it was his refusal to be relocated (Sun Oil's Brief in Opposition p. 13).

It should be noted here that the petitioner does not claim nor defend the right to be free from job transfers. Neither does this petitioner claim the right to any continuing employment. The petitioner only seeks protection against antitrust violations. When these decisions are made independent of an antitrust violation, there is less impact. Transfers will ordinarily mean promotion and growth. When tied to an illegal merger and the resulting consolidations, the transfer oftentimes will mean a demotion.

Sun Oil claims that the petitioner was offered a higher salary if he would accept the transfer. There is, however, a factual dispute on this issue. Furthermore, it was not considered by the 10th Circuit. Nevertheless, this Court ought to address itself to the problems of transfers that result from illegal corporate mergers.

It would seem that, at the most, a refusal to accept the transfer offer should go toward the mitigation of damages. Employees actually deserve protection against antitrust violations that result in geographic transfers. Before the ICC authorized the consolidation of the Pennsylvania

Railroad Company and New York Central, the companies were required to agree that no employee would be dismissed and no employee would be transferred beyond their general locality. *Erie-Lackawanna R.R. Co.* v. *United States,* 279 F. Supp. 316, 337 (S.D. N.Y. 1967). Involved in *Railway Labor Assn.* v. *United States,* 339 U.S. 142, 147-148 (1950) was an agreement that:

> "prescribed rates of compensation for employees deprived of their employment, for those continued in service, but displaced from their former positions, and for those required to move to new places of residence."

These railroad employees are protected against transfers although Congress was seeking a compromise between a recognized need to reduce free competition and the apparent need to protect employees. In the present case, there is involved a segment of our economy in which Congress has sought free and unrestrained competition. The employees are thus entitled to the full protection that free competition offers—nothing more and nothing less.

It is highly unlikely that the petitioner would have been requested to turn his back to his 17 years in Tulsa, except for the fact that the merger of his employer with Sun Oil eliminated his job. The petitioner and other employees who can show injury should have the right to prove their loss. Whether the American worker has access to the courts is the issue before this Court.

CONCLUSION

Based on the above discussion of the law and the powerful HEW documentation of "Work in America" this Court is requested to grant the Petition for Writ of Certiorari. Three separate corporate mergers involving six previously independent oil companies demonstrate the seriousness of the corporate merger trend within the petroleum industry. Through these mergers, the life and destiny of American workers is controlled by a few individuals and corporations.

The employees, bearing the expense of a destruction of free competition, respectfully request that their petition be granted. It is further requested that the cases be consolidated for briefing and argument.

Respectfully submitted,

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APR 30 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1134

ELBERT C. REIBERT, individually and on behalf of employees the previously existing Sinclair Oil Corporation, the employees Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,
Petitioners,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,
Respondents.

EN F. MANS, individually and on behalf of all persons employed Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,
Petitioners,

v.

SUNRAY D-X OIL COMPANY and SUN OIL COMPANY,
Respondents.

L JEANNENE JOBE, individually and on behalf of employees the previously existing Amerada Petroleum Corporation, the ployees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,
Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,
Respondents.

PETITION FOR REHEARING

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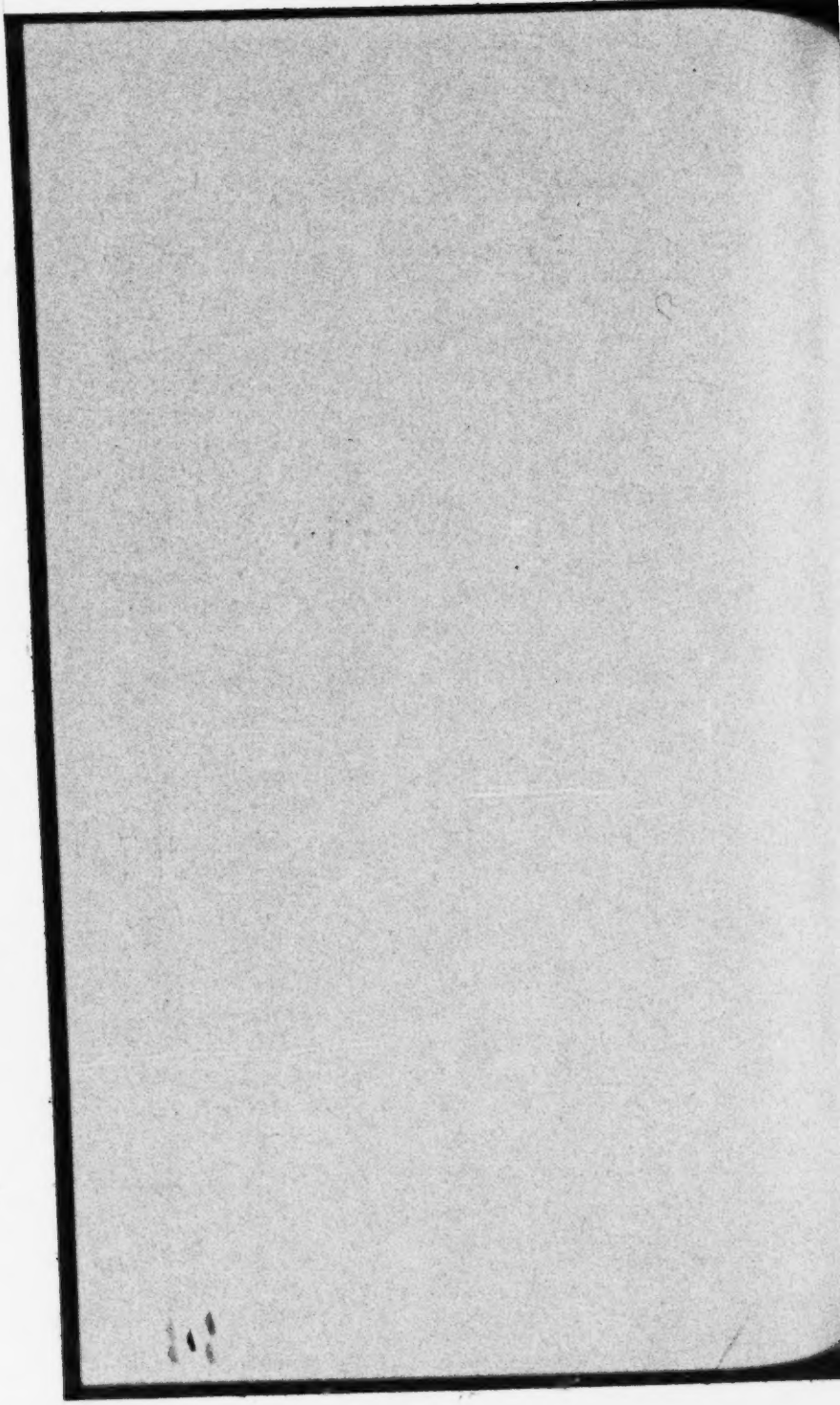

PETITION FOR REHEARING

On April 16, 1973, the petition for a writ of certiorari in this case was denied. This denial came as a shock for it left thousands of injured employees without any legal redress. Directness of injury was admitted by the wrongdoers, yet standing to sue denied. Unless this Court reconsiders its decision, the employees not only lose that which is due them under the antitrust statutes, but they will be called upon to pay the legal cost incurred by the corporate giants. This will mean that the victim will end up paying the cost of the law violator. An aberration created by this Court's denial of the writ sought "reflects no glory upon American jurisprudence." 75 Cong. Rec. 4915 (1932) (remarks of Senator Wagner).

The little man is expected to obey the law; if he doesn't, he goes to jail. Big oil companies are excused from any duty to obey the law. There is no pity, no mercy, no clemency for the little man who violates the law; there can be no excuse or justification. An explicit example of this is found in *Holder* v. *State of Oklahoma,* 488 P.2d 600 (Okla. 1971).

John Holder was a man who believed himself injured by the merger of Sun Oil Company and Sunray DX Oil Company. Instead of seeking judicial relief, Holder sent an extortion letter to Sun Oil demanding $75,000 as compensation for his injury. In the letter, Holder wrote that: "I am prepared and most willing to create multi-million dollar damage to your Tulsa Refinery at which I have concentrated my main effort." *Id.* at 602.

For his attempted extortion, John Holder was arrested, tried and convicted; and he received the maximum sentence of five (5) years in prison. On appeal, Holder sought

judicial clemency on the ground that he had honorably served his country in the military. Rejecting this argument, the Oklahoma court stated:

> "The fact that a man who commits the crime is an ex-soldier and honorably served his country is no excuse or justification for his commission of a crime. . . ." *Id.* at 602.

John Holder is now confined in prison because he violated the law. Sun Oil Company, whose merger with Sunray DX allegedly injured Holder, remains free to act outside the law. See: Tulsa World, September 2, 1971, p. 25A. This Court has taken a strong position against the use of violent tactics to right supposed wrongs. In the case of *In re Debs,* 158 U.S. 564 (1895), this Court observed that:

> "When the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual will consent to waive his right to the use of force and await its action." *Id.* at 583.

John Holder ignored the basic belief of any orderly society when he threatened Sun Oil with violence. He committed a wrong and was punished with a long prison sentence. If there is to be any lasting order of a society based upon fundamental concepts of justice and fairness, Sun Oil should likewise be required to answer for its wrongs. It should not be allowed to enter an illegal merger with Sunray DX and then be protected by a shield of judicial clemency.

The employees involved in the present case, injured by the same illegal act that allegedly caused injury to John Holder, have followed to the letter the teachings of this

Court in *In re Debs*. They have, as suggested in that case, patiently awaited the action of the law. But now after four long years, these employees have been turned away from the courts without any relief. Worse, they have not even been permitted to have the merits of their claim considered.

Not one single court has given any consideration to the sound legal arguments of the employees. The arguments have fallen on deaf ears. Without any rational explanation, these employees are told that they have no right to be in court, regardless of how much they were injured by the illegal acts of the oil companies. When the law on the subject appears to be so clear and relief is still denied, these injured employees can retain very little confidence in the judicial process.

Mr. Justice Frankfurter spoke strongly against the judicial activism that he considered a serious threat to the integrity of the Court. *Baker* v. *Carr*, 369 U.S. 186 (1962). He stated:

> "It may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strangely entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." *Id.* at 267.

It is no less judicial activism when the Court declines to give relief that is provided by statute. The withholding of this relief will jeopardize the sustained public confidence upon which this Court must rely just as quickly as the extension of relief beyond the boundaries established by Congress. Congress explicitly provided that employees had standing under the antitrust laws to challenge those

acts that injured jobs and job opportunities. Perhaps these injured employees will not prevail in the final outcome; however, they have a statutory right to have the merits of their claim considered by an impartial court. Confidence in this Court and in the total judicial process demands at the very least a high degree of consistency.

With all due respect toward this Court, the denial of the petition in this case is totally inconsistent with the principles enunciated in earlier decisions. It is these principles that provide some order to our system; that furnish necessary guidelines to allow lawyers to advise the people of their rights. Petitioners realize that the granting of a Petition for a writ of certiorari is discretionary with the Court. This should not mean, however, that a petition should be arbitrarily denied. When the guidelines for certiorari are satisfied, the petition should be granted.

Nothing more important than the issue involved in this case has ever come before this Court. Many significant decisions have of course been handed down in the areas of civil rights, criminal justice, and individual liberties. But compared to the rights sought to be defended in the present case even the civil rights cases appear minor. For what good does it do to give a man his civil rights against government intrusion when the people are committed to slavery of big corporations.

Because of a lack of antitrust enforcement, corporations are gaining control of the land upon which people can farm. Corporations own the factories and can give or take away the jobs of people. Since the days of *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 277 (1839), when corporations gained the right to grow into interstate units, they have today grown into multi-national business em-

pires. Hopefully, the corporation has not yet reached the size and gained the power that would make them immune from legal attack. If they have, then our nation conceived upon the principle of justice is doomed.

The only hope that the people have is for the courts to follow the law as it is written and as read in light of the legislative purpose. If employees are to be enslaved by big corporations, it should be done by Congress and not the Court. This is why it is imperative that greater consideration be given to the petition filed in this case. At stake is the basic freedom of employees and the confidence and integrity that the people have in this Court.

In the past, this Court and most of the Justices have expressed support for the basic issue involved in this case. Petitioners are entitled to rely on this past experience, and to expect that relief will be granted or denied on the basis of this judicial experience. If no weight can be given to what this Court has told us in the past, counsel must then advise his clients that filing a petition with the Supreme Court is the same as going to Las Vegas and playing the roulette wheel. It would, however, be most unfortunate if a petition for certiorari were ever treated with so little respect.

Hope held by the injured employees over the last four years has been based on the notion that the Supreme Court Justices voted with a high degree of consistency. This consistency is missing in the present case which offers one of the very strong reasons for a rehearing and the granting of the petition.

If Mr. Chief Justice Burger refused to vote for the petition in the present case it is inconsistent with his support of the presumption of reviewability expressed in *Association of Data Processing Service Organization, Inc.* v.

Camp, 397 U.S. 150 (1970); and *Barlow* v. *Collins*, 397 U.S. 159 (1970). While serving on the D.C. Circuit, Mr. Burger expressed even stronger support for standing. In *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966), Judge Burger wrote: "Courts have resolved questions of standing as they arose." *Id.* at 1000. This can only be done if the Court agrees to review the case that raises a serious question of standing. Particularly pertinent to the present case are the remarks of Judge Burger to the effect that experience at times tells us that official enforcement agencies may not continue to be reasonably adequate. *Id.* at 1003. Based on his strong expressions in favor of standing, it would appear reasonable for the employees to anticipate a favorable vote from Mr. Chief Justice Burger.

If Mr. Justice Brennan did not vote to give the employees an opportunity to present their argument to the Court it would come as a great surprise to the employees since Mr. Justice Brennan has been one of the most consistent spokesmen in favor of standing and against the evils of monopolies. In his concurring and dissenting opinion filed in *Data Processing* and *Barlow* v. *Collins*, the most impressive thing said was that the issue of standing should be clearly separated from the merits of the case. Petitioners placed great reliance on the idea expressed by Mr. Justice Brennan that: "standing exists when the plaintiff alleges . . . that the challenged action has caused him injury in fact. . . ." This idea that a plaintiff should have his day in court was applied by Mr. Justice Brennan in his dissenting opinion filed in *Hawaii* v. *Standard Oil Company of Calif.*, 405 U.S. 251 (1972), an antitrust standing case. It is difficult to conceive how Mr. Justice Brennan could now decline to at least listen to the arguments of the employees who have been severely injured by illegal corporate mergers.

If Mr. Justice Stewart declined to vote for certiorari in the present case it is inconsistent with his concurring opinion filed in *California Motor Transport Co.* v. *Trucking Unlimited*, 405 U.S. 251 (1972), where the right of access to courts was recognized as part of the right to petition the government for a redress of grievances. At the present time, there is no group that needs access to the courts more than American workers.

Employees would expect Mr. Justice White to support the petition seeking standing for employees after he had earlier spoken so strongly in favor of private antitrust enforcement. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Mr. Justice White had also earlier joined with Mr. Justice Brennan in *Data Processing* and *Barlow* v. *Collins*; the position defended in those cases was that a plaintiff ought to have the merits of his claim reviewed by the courts. Based on this precedent, Mr. Justice White could reasonably be expected to vote in favor of the employee petition.

Mr. Justice Marshall, as much as any of the other Supreme Court Justices, has made judicial expressions that would cause the employees to believe that he would support their petition in the present case. In the past, he has been a staunch defender of civil rights; he has vigorously supported the issue of standing, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); and he has looked upon the antitrust laws as the social instrument that Congress intended. In *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), Mr. Justice Marshall described the antitrust laws as the Magna Charta of free enterprise that protect economic freedom and our free enterprise system. He did write the opinion that denied standing to the State of Hawaii; however, he called for private citizens to file private antitrust suits. *Hawaii* v.

Standard Oil Company of Calif., 405 U.S. 251 (1972). Finally and most important to the present case, Mr. Justice Marshall clearly recognized the standing of employees in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), when he stated that the antitrust laws were as important to baseball players, football players, lawyers and doctors as they are to members of *any other class of workers*. *Id.* at 292.

Could Mr. Justice Blackmun vote against the petitioners who were seeking protection of their jobs against antitrust violations, when he made strong judicial expressions in favor of petitioners seeking to protect trees and the American wilderness? *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). No one questions the importance of our environment and our great and beautiful wilderness. The greater resource is the lives of people which is the thing involved in the present case. We cannot long survive if we permit the devastation of either our natural or human resources. Mr. Justice Blackmun closed his dissenting opinion in the *Sierra Club* case with the observation of John Donne. The words "any man's death diminishes me, because I am involved in Mankinde" are far more appropriate in the present case. When you take away the job of a man, you take away his life.

The point to be made by the above discussion is that there is great inconsistency between the judicial expressions of our Supreme Court Justices and their vote to deny the petition in the present case. If we are to have confidence in our judicial process, we ought to be able to place greater reliance on what has been done and what has been said. It has been on this basis that the employees injured by the oil companies' flagrant antitrust violation have been able to retain any ray of hope over the past four years. During their struggle to obtain some legal redress they manifested a high degree of faith in our system of justice.

But not only have these American workers failed to receive any sort of legal redress; they have been denied a day in Court without ever being heard. The oil companies will remain free to further gouge their workers and the American consumer. This unhappy conclusion cannot give Americans much hope for the future; they must accept as a fact of life that the individual who violates the law will be sent to prison while the corporate law violator suffers no penalty.

The employees who have been terminated as a direct result of illegal oil company mergers strongly urge this Court to reconsider their arguments. The human resources involved in this case deserve the closer attention of this Court.

Respectfully submitted,

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FILE COPY

JUN 1 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1124

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,

Respondents.

KEN F. MANS, individually and on behalf of all persons employed by Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,

Petitioners,

v.

SUNRAY D-X OIL COMPANY and SUN OIL COMPANY,

Respondents.

DEL JEANNENE JOBE individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,

Respondents.

KEN F. MANS, individually and on behalf of all persons employed by Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,

Petitioners,

v.

SUNRAY D-X OIL COMPANY and SUN OIL COMPANY,

Respondents.

DEL JEANNENE JOBE individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

On May 12, 1973, this Court declined to reconsider its earlier action on the petition for a writ of certiorari. Since these petitions, there have been developments that must be considered important reasons for granting review. This Court is respectfully requested to give careful consideration to these developments.

This motion is not filed with any great expectations that it will be granted. Statistics indicated that this Court favors government antitrust enforcement over private suits; although, it should be noted that this is the antithesis of what Congress intended. Recorded experience indicates that this Court will grant certiorari in only about 5% of private cases while granting review in 80% of the cases filed by the Government.

In spite of the enormous odds against the petitioners, we would be remiss in our duty as lawyers representing the many working people involved if a single stone were left unturned. If this motion is denied, these employees can at least be told in good conscience that their jobless fate was the result of a faulty but pervasive economic philosophy and a judicial aberration; and not the result of a lack of vigor and determination in their representation. For the sake of our nation, however, it would be better if the employees could be told that their loss resulted from poor and inadequate counsel. At least if this were the case, a more capable lawyer could salvage the job protection that Congress intended the antitrust laws to provide.

The most important reason not heretofore considered for granting review in the present case involves the tragedy of what is being referred to as the Watergate. Influence peddling, obstruction of justice, burglary by public officials, perjury, and electronic invasions into the private lives of American citizens are characteristic of the symbol of Watergate. Our government structure and the total political process has been undermined and crippled. Persons who once stood to speak of law and order now stand indicted; but the indictments came only because the free press refused to allow the breach of public duty to be covered up. The vigorous investigation of the Watergate was

not a thing initiated by the Justice Department or other administrative agency.

No one can accurately define the full scope of influence peddling that has occurred under the present administration. One is left only to speculate about incidents recorded in news accounts that have enough ring of truth to cause concern.

1. *Robert Vesco and the SEC*: John Mitchell, our former Attorney General, and Maurice Stans were indicted for alleged influence peddling when they allegedly used their great influence to help financier Robert Vesco. Consideration for this private favoritism was said to be a $200,000 contribution to the Nixon campaign.

2. *I.T.T. Settlement*: For another $200,000 contribution, the Justice Department under the leadership of John Mitchell, allegedly dropped its appeal of an adverse ruling in one of the largest antitrust suits in American history. N.Y. Times, Mar. 1, 1972, sec. 1, at 1, col. 4.

3. *Grain Scandal*: Grain companies, it has been charged, received advance information on the Russian wheat deal which allowed them to take advantage of American wheat farmers. Several private antitrust suits are pending in connection with what has been alleged to be a conspiracy among the grain companies and the United States Department of Agriculture. *In Re: Wheat Farmers Antitrust Actions*, Docket No. 129, Judicial Panel On Multidistrict Litigation.

4. *Atlantic Richfield-Sinclair settlement*: More shocking than any other settlement in an antitrust case was the one in connection with the Atlantic Richfield-Sinclair merger. This settlement was described as "one

> of the most extraordinary remedies ever acquiesced in by the Antitrust Division in the history of antitrust enforcement." *Bartlett Jurisdictional Statement,* p. 6, *Bartlett* v. *United States,* 401 U.S. 986 (1971).

No charge is made of any influence peddling in connection with the Atlantic Richfield-Sinclair settlement. Nevertheless, it is strange that the Justice Department, headed by John Mitchell, did not provide any protection to the employees of the companies. In a much less spectacular case, Ford Motor Company-Auto Lite, the same Justice Department insisted on explicit employee protection. This Court approved a portion of that decree that:

> "protected employees of the New Fostoria Plant by ordering Ford to condition its divestiture sale on the purchaser's assuming the existing wage and pension obligations and to offer employment to any employee displaced by a transfer of nonplug operations from the divested plant." *Ford Motor Company* v. *United States,* 405 U.S. 562, 572 (1972).

Must the only protection afforded be protection provided by the government?

There would have been no need for the terminated Atlantic Richfield employees to assume the heavy burden of this antitrust litigation if the Justice Department had been more vigorous in its prosecution. The employees were sold out by this official enforcement agency which is what Watergate is all about. When Sections 4 and 16 of the Clayton Act were being debated, Congress was fearful of the same problems that are now coming to light under Watergate.

Senator Thompson stated that the Sherman Act failed because "those in power were either too friendly with or

too much afraid of the men of wealth". 51 Cong. Rec. 14,222 (1914). Senator Norris noted that even the hiring of 10,000 lawyers would be ineffective since they would be under the supervision of the Attorney General. 51 Cong. Rec. 14,524 (1914). Denying any vindictiveness toward the then Attorney General, Senator Reed declared:

> "I am not prepared to charge bad faith to past Attorneys General of the United States, but I am prepared to say that, in my humble judgment, the same zeal has not been back of the enforcement of this law many times that has been back of the enforcement of the laws aimed at the poor fellow who makes moonshine whiskey or sells a box of cigars without having the correct number of stamps upon the box. As to any law that has been so enforced that monopoly has grown like a green bay tree, so that its evil roots have spread into every State and every community, I am prepared to say that you need some more enforcement and you need some independent action by independent man." 51 Cong. Rec. 14,522 (1914).

Congress rejected the suggestion that the States' Attorney General be granted antitrust enforcement power. The most effective check on the Attorney General, the "real teeth in enforcement" as Congressman Webb described it, was the private suit seeking treble damages or injunctive relief. 51 Cong. Rec. 16,274 (1914).

The Attorney General would have no power or effect to offer favorable settlements to corporate violators if a private person were likely to follow with a more vigorous enforcement policy. However, when the courts close their doors to the private person who is injured, the Attorney General is free to play games with the American people. This then leads to Watergate situations.

When our courts of law give our public officials room to be corrupt, some public officials can be expected to be backed by a sanction and if sanction is abolished, then there is no law. This, it is suggested, is the present state of the antitrust laws. For this, our nation is weakened and our corporate impersonalities are free to trample on the lives of her people.

So, in this era of scandal in government, big corporations and big money the alternatives for the worker are clear. The institutions have failed when persons are undeniably injured and not a court in the land will respond.

When a segment of society speaks and is not heard there is no reason for further speech. It is over. Lord Coke's pronouncement that "the monopolist who takes a man's job takes his life" is this society's epitaph, and I say it shamelessly, but not without shame for the loss.

We thus request that this Court review the petition so that justice may be served.

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